(5) 269

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 183

LEONARD METCALF AND HARRISON P. EDDY, COPARTNERS UNDER THE NAME AND STYLE OF METCALF & EDDY, PLAINTIFFS IN ERROR,

vs.

JOHN J. MITCHELL, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS

FILED SEPTEMBER 26, 1924

No. 376

JOHN J. MITCHELL, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, PLAINTIFF IN ERROR,

vs.

LEONARD METCALF AND HARRISON P. EDDY, COPARTNERS UNDER THE NAME AND STYLE OF METCALF & EDDY

FILED APRIL 23, 1925

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

(30,638, 31,066)

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The [illegible]

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(30,638, 31,066)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 183

LEONARD METCALF AND HARRISON P. EDDY, COPARTNERS UNDER THE NAME AND STYLE OF METCALF & EDDY, PLAINTIFFS IN ERROR,

vs.

JOHN J. MITCHELL, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS

FILED SEPTEMBER 30, 1924

No. 376

JOHN J. MITCHELL, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, PLAINTIFF IN ERROR,

vs.

LEONARD METCALF AND HARRISON P. EDDY, COPARTNERS UNDER THE NAME AND STYLE OF METCALF & EDDY

FILED APRIL 22, 1925

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 11, 1925

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[fol. 1] IN UNITED STATES DISTRICT COURT

PLAINTIFFS' WRIT OF ERROR AND RETURN

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Leonard Metcalf, of Concord, and Harrison P. Eddy, of Newton, both in the District of Massachusetts, copartners under the name and style of Metcalf & Eddy, plaintiffs, and John J. Mitchell, former Collector of Internal Revenue for the District of Massachusetts, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the 22nd day of October next, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of September, in the year of our Lord one thousand nine hundred and twenty-four.

James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

Allowed by James A. Lowell, U. S. District Judge.

[fol. 2] Return of District Court on Plaintiffs' Writ of Error

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS, ss:

And now here the Judge of the District Court of the United States in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit, within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this twenty-sixth day of September, A. D. 1924.

James S. Allen, Clerk. (Seal of the United States District Court, Massachusetts.)

[fol. 2a] IN THE UNITED STATES DISTRICT COURT

DEFENDANT'S WRIT OF ERROR AND RETURN

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you between Leonard Metcalf, of Concord, and Harrison P. Eddy, of Newton, both in the District of Massachusetts, copartners under the name and style of Metcalf & Eddy, plaintiffs, and John J. Mitchell, former Collector of Internal Revenue for the District of Massachusetts, defendant, a manifest error hath happened, to the great damage of said defendant, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the 22nd day of October next, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of September, in the year of our Lord one thousand nine hundred and twenty-four.

James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

Allowed by James A. Lowell, U. S. District Judge.

[fol. 2b] Return of District Court on Defendant's Writ of Error

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS, ss:

And now here the Judge of the District Court of the United States in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit, within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this twenty-sixth day of September, A. D. 1924.

James S. Allen, Clerk. (Seal of the United States District Court, Massachusetts.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Caption omitted]

No. 2072, Law Docket

LEONARD METCALF et al., Plaintiffs,

v.

JOHN J. MITCHELL, Former Collector of Internal Revenue, Defendant

WRIT OF ATTACHMENT AND RETURN

MASSACHUSETTS DISTRICT, ss:

[L. S.] The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of John J. Mitchell, former Collector of Internal Revenue for the District of Massachusetts, of Boston, in our District of Massachusetts, to the value of two thousand five hundred dollars, and to summon the said defendant (if he may be found in your District) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said district of Massachusetts, on the third Tuesday of March, 1923. Then and there, in our said Court, to answer unto Leonard Metcalf, of Concord, and Harrison P. Eddy, of Newton, both in [fol. 4] our District of Massachusetts, copartners under the name and style of Metcalf & Eddy. In an action of contract; to the damage of the said plaintiffs (as they say) — the sum of two thousand five hundred dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness the Honorable James M. Morton, Jr., at Boston, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-three.

Edith G. Rollins, Deputy Clerk.

Officer's Return on Writ

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, February 7, 1923.

Pursuant hereunto I have this day attached a chip as the property of the within named John J. Mitchell, former Collector of Internal Revenue for the District of Massachusetts, and thereafter on the same day I summoned the within named defendant to appear at Court and answer as within commanded by giving to him in hand at Boston, in said District, a true and attested copy of the within writ.

W. J. Keville, U. S. Marshal, by Christopher Ghiloni, Deputy.

Service	$2.00
Travel	.12
	$2.12

The writ in this cause was duly entered at the March Term of this Court, A. D. 1923, when and where the parties appeared by their respective attorneys.

IN THE UNITED STATES DISTRICT COURT

DECLARATION—Filed March 20, 1923

The plaintiffs say that in the year 1917 and continuously since that date they have practiced their profession as consulting civil engineers as co-partners under the name and style of Metcalf & Eddy with their principal place of business at Boston in the State of Massachusetts; and that a substantial portion of their work was performed by them in the year 1917 in the employment of divers states and political subdivisions of states in the course of the public [fol. 5] and governmental functions of said states and subdivisions thereof, namely, the protection and preservation of the public health by the construction and maintenance of adequate sewerage systems and waterworks; and that the services of the plaintiffs as aforesaid were of a public and governmental character.

That the compensation paid by said states and political subdivisions thereof was not subject to taxation by the United States under the Revenue Act of 1917.

(1) Because it is expressly exempted by the Revenue Act of 1917.

(2) Because it is not within the power of Congress under the Constitution of the United States to tax income of the character above described.

That the plaintiffs filed returns of their income for the year 1917 of said partnership in the manner and at the time prescribed by law, but they deducted from income so returned income derived as aforesaid from states and political subdivisions thereof; and they duly paid the tax assessed on said partnership in accordance with their said return.

That thereafter inquiries were made of them by the Commissioner of Internal Revenue or his deputies; and information with respect to said income requested; and after the receipt of said information said Commissioner on or about January 25, 1921 assessed upon said partnership of Metcalf & Eddy an additional or further excess profits tax of $1,259.27, the greater part of said tax, namely $1,257.69, being assessed upon income exempt from taxation as aforesaid; and the defendant as Collector of Internal Revenue as aforesaid demanded of the plaintiffs the payment of said tax and threatened to enforce payment by the arrest of their persons or levy upon their goods if said tax was not paid forthwith, and upon May 25, 1921, the plaintiffs in order to avoid such arrest and levy paid said additional tax of $1,257.69, under protest in writing, to the defendant.

That thereafter, on May 8, 1922, the plaintiffs filed with the Collector of Internal Revenue for the Third District of Massachusetts a claim for refund in the manner and form provided by the Revenue Acts and the Rules and Regulations thereunder wherein they asked for the refund of said sum of $1,257.69 illegally and unlawfully [fol. 6] assessed as aforesaid; but on the 30th day of December, 1922, said claim was rejected and the money of the plaintiffs so illegally and unlawfully collected by the defendant has not been restored to them.

Wherefore the defendant owes the plaintiffs the sum of $1,257.69 for money had and received by the defendant to the plaintiffs' use, with interest thereon from May 25, 1921.

By Their Attorney, Philip Nichols.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY

At the same term, to wit, April 9, 1923, an answer was filed.

This cause was thence continued from term to term to the December Term, A. D. 1923, when, to wit, January 11, 1924, the following stipulation waiving jury trial was filed:

IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING JURY TRIAL—Filed January 11, 1924

It is stipulated and agreed that the right to trial by jury in the foregoing case shall be waived and the case be set down for trial in the session of the court without jury.

Philip Nichols, Attorney for Plaintiffs. Robert O. Harris, U. S. Attorney, by Albert F. Welsh, Asst. U. S. Attorney, for Defendant.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO WITHDRAW ANSWER AND FILE A SUBSTITUTED ANSWER—Filed and Allowed by Consent January 16, 1924

Now comes the defendant in the above entitled action and moves this Honorable Court that his answer of general denial heretofore filed may be withdrawn and the following answer substituted therefor.

Robert O. Harris, United States Attorney. Albert F. Welsh, Assistant U. S. Attorney.

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER

Now comes the defendant in the above entitled action and for answer admits:

1. That Metcalf & Eddy were in the year 1917 consulting engineers as co-partners, with their principal place of business at Boston in the State of Massachusetts;

2. That the plaintiffs filed a return of their income for the year 1917 as a partnership, and duly paid the tax assessed in accordance with their said return;

3. That thereafter examination was made by the Commissioner of Internal Revenue;

4. That the Commissioner of Internal Revenue made an additional assessment of further excess profit tax of $1,259.27 and demanded payment thereof, which was paid by plaintiffs on May 25, 1921;

5. That plaintiffs filed a claim for refund on May 8, 1922, with the Collector of Internal Revenue for the District of Massachusetts in the sum of $1,257.69, which claim for refund was rejected by the Commissioner on December 30, 1922.

6. In further answer to plaintiffs' declaration herein and as a defense and as a bar to plaintiffs' cause of action, the defendant alleges the plaintiffs were not officers or employees of a State or any political subdivision thereof within the meaning and intent of the Act of October 3, 1917, entitled "An Act to Provide Revenue and to Defray War Expenses and for Other Purposes," and denies that the compensation paid by said States and political subdivisions thereof and received by plaintiffs during the year 1917 was not subject to taxation by the United States, as stated in plaintiffs' declaration.

Further answering plaintiffs' declaration, defendant denies each and every allegation therein stated not heretofore specifically admitted and asks judgment of the court dismissing the complaint and for his costs and disbursements.

Robert O. Harris, United States Attorney. Albert F. Welsh, Assistant U. S. Attorney.

In United States District Court

Minute Entries

At the same term, this cause was set down for hearing and fully heard by the court without a jury, the Honorable James A. Lowell, District Judge, sitting, on the twelfth and thirteenth days of February, A. D. 1924.

[fol. 8] Said cause was thence continued under advisement to the March Term, A. D. 1924, when, to wit, May 21, 1924, an opinion of the court was announced.

At the same term, to wit, June 13, 1924, draft bills of exceptions were filed both by the plaintiffs and the defendant within extended time.

This cause was thence continued from term to term to the present September Term, A. D. 1924, when, to wit, September 15, 1924, substituted bills of exceptions are filed by the plaintiffs and the defendant and are allowed by the court.

In United States District Court

Agreement for Entry of Judgment—Filed September 15, 1924

In the above entitled case it is hereby agreed that judgment for the plaintiffs pursuant to the findings of the court may be entered forthwith, and the amount thereof as determined by said findings is $120.57.

Philip Nichols, Edwin H. Abbot, Jr., J. A. Boyer, Attorneys for Plaintiffs. Robert O. Harris, United States Attorney, Albert F. Welsh, Assistant U. S. Attorney, Attorneys for Defendant.

J. A. L., U. S. District Judge.

[fol. 9] IN UNITED STATES DISTRICT COURT

JUDGMENT

Thereupon, to wit, September 22, 1924, it is considered by the Court, the Honorable James A. Lowell, District Judge, sitting, that Leonard Metcalf and Harrison P. Eddy, Plaintiffs, on findings of the court, recover of the said John J. Mitchell, Former Collector of Internal Revenue, defendant, the sum of one hundred twenty dollars and fifty seven cents, ($120.57).

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' SUBSTITUTED BILL OF EXCEPTIONS AND ORDER SETTLING SAME—Draft bill filed June 13, 1924; substituted bill filed and allowed September 15, 1924

This case came on for trial before the Honorable James A. Lowell, Judge of said Court, without a jury, (the right to trial by jury having been duly waived by both parties hereto) at a sitting of said court held at Boston on February 12, 1924 and then and there the following proceedings were had:

The evidence offered by the parties established the following facts:

The plaintiffs are consulting civil engineers practicing in the water works and sewage fields, having been copartners under the firm name of Metcalf & Eddy since 1907 and having their offices at 14 Beacon Street, Boston, Mass. They specialized in the design, construction, supervision and management of waterworks and sewage systems. A large part of their services were performed for states [fol. 10] and political subdivisions thereof, these services being paid for in various ways, in some cases at a fixed rate per diem, in others by a stated sum for a particular piece of work, in others by a percentage of the total cost of a piece of construction work, and in others by a flat salary". Some of the engagements were temporary and some permanent to the extent that they ran on from year to year.

In some cases the plaintiffs made preliminary investigations with a view to recommending what should be done by the public authorities, and sometimes themselves prepared the plans. Sometimes they acted in the same or a similar capacity to that in which the City Engineer of the municipality would have acted had there been one; sometimes they assisted the City Engineer in a consulting capacity, in some instances taking over some of his staff. The plaintiffs were in many instances engaged to keep track of the quality or condition of a public water supply and to advise upon changes in method in order to protect the public health and to consider problems of protection against fire. In a number of cases the regular employees of the municipalities were subject to their orders and direction.

During the calendar year 1917 the plaintiffs received the followings items of gross income from states and political subdivisions of states under the respective circumstances stated as follows: said items all being items on which said additional tax was assessed:

1. Marlboro, Massachusetts.—In 1909 the plaintiff Eddy was engaged by the City of Marlboro, under authority of chapter 312 of the Acts of 1888, to supervise the operation of the municipal sewage-treatment plant, and render periodical reports thereon to the Water and Sewer Board of the city, and his employment has continued without interruption to date; the caretaker of the plant, and other regular employees of the city, worked under Mr. Eddy's direction. [fol. 11] Following a change in the basis of payment early in 1917 the compensation for these services was a stipulated sum of $40 a month. The total payments in 1917 aggregated $562.19.

2. Commonwealth of Massachusetts.—In 1916 the plaintiffs were engaged by vote of the Trustees of the Medfield State Hospital, a state institution, to perform the periodic inspection and the supervision of the operation of the sewage-treatment plant at the hospital, and this service continued for a considerable period at an annual salary of $500. The work was similar to that performed for the City of Marlboro; Mr. Eddy visited the plant from time to time, took samples for chemical analysis, and gave instructions to the caretaker as to what he should do to improve the operation of his plant. The total amount received from this source in 1917 was $342.61.

3. Commonwealth of Massachusetts.—In 1917 the firm of Metcalf & Eddy was engaged by the Trustees of the Medfield State Hospital to prepare designs for additions and improvements on the sewage-treatment plant. This work consisted of studying the design of the plant then in operation, deciding as to what improvements and enlargements ought to be made in the structures and in preparing drawings upon which a contract for the enlargement and improvement of the plant could be based. The amount paid for this service was $850.

4. Commonwealth of Massachusetts.—This item comprised the study of an alternative scheme to that covered by the previous item. It required the study of a new line of sewer from the hospital buildings to a location somewhat distant from the existing sewage-treatment plant, an estimate of cost, and recommendations to the Department of Mental Diseases as to the advisability and desirability of substituting this site for the one then in use for the treatment plant. The amount received from this source was $865.94.

[fol. 12] 5. Nahant, Massachusetts.—The plaintiffs were engaged by the town authorities to study the problem of additional fire protection, the insurance companies having advised the town to lay additional mains, and the plaintiffs laid out and advised the adoption of a program of pipe extensions to be made over a period of four or five years. The total charge for his service was $200; of this the amount allocated to 1917 was $51.10.

6. Schenectady, New York.—This service comprised visits to the sewage-treatment plant at the City of Schenectady, examination of the plant, and conferences with the man in charge of the plant as to operating conditions, and advising him what changes or improvements should be made; an examination of his monthly reports and comments thereon at like intervals. The employment began in 1916 and was at an annual salary of $1,000 and has continued with one interruption to the present time. It was based upon a resolution of the Board of Estimates and Appropriations of the city reading as follows:

"Resolved: that the appropriation of $1,000 from the item noted 'Salaries—Consulting Engineer' in the budget of the Bureau of Sewage Disposal for services to be rendered by Harrison P. Eddy of the firm of Metcalf & Eddy of Boston, as per his letter of February 3, 1916, which is made a part hereof, be and the same is hereby approved and concurred in by this Board."

This employment continued on the same basis from year to year, and the amount received therefrom in 1917 was therefore $1,000.

Milwaukee, Wisconsin.—This service consisted of a study of the sewage-disposal problem with particular reference to a plan for the treatment of the sewage before it was discharged into Lake Michigan, from which the water supply of the city was taken. This work was [fol. 13] a continuation of work done by a board of consulting engineers, of which Mr. Eddy was a member some time prior to 1917. In 1917 Mr. Eddy received a telegram from the Chairman of the Sewage Commission of Milwaukee reading as follows:

"The sewage commission has authorized me to select a consulting engineer to advise it as to the adequacy of plan outlined in chief engineer's report. Can you serve as such and how soon?"

Mr. Eddy accepted the appointment and served continuously until October 18, 1921, when it was voted by the Sewage Commission

"to discontinue services of Harrison P. Eddy as consulting engineer for the commission and thereafter to call upon his services only when specially required." The total amount received from this source in 1917 was $9,211.79.

New Haven, Connecticut.—The service in this case was the examination of plans for a dam across a river, with tidegates to prevent the salt water from backing up, with a view to studying the sufficiency of the plans, and a report thereon to the Park Department of the City. The payment for this service was $100.

Dayton, Ohio.—The plaintiff Metcalf had served the City of Dayton a number of years, and in 1917 he was engaged by the city to report on plans for meeting the danger of serious fire due to the fact that the city's water supply was derived from artesian wells and on account of the variation in hourly use of water there might be no water available to extinguish fires occurring at certain times in the day; he met the situation by recommending the construction of a reservoir in a certain location. He was paid $100 per day for his services, and received from this source in 1917 the sum of $4,320.28.

[fol. 14] Dayton, Ohio.—The plaintiffs were engaged to design, and supervise the construction by a third party under contract with the city, of the reservoir referred to in the preceding paragraph, receiving as compensation 6 per cent of the cost. The City Engineer did not have charge of this work, and Mr. Metcalf acted in effect as special City Engineer engaged for that particular work. The plaintiffs received from this source in 1907 the sum of $6,112.23.

Canton, New York.—One C. E. Perry, a civil engineer, had been engaged by the Village of Canton to supervise the construction of certain waterworks at a salary of $500 per month, the village to furnish such inspection and assistance as might be required. Mr. Perry having been called on for military service, by agreement with Mr. Perry and the municipal authorities the plaintiffs took over his position and compensation during his absence. The total amount received by the plaintiffs from this source in 1917 was $1,801.67.

Sherburne, New York.—This was another of Mr. Perry's positions under which he was supervising for the town the construction of auxiliary waterworks at a salary of $300 per month, and the duties and compensation were taken over by the plaintiffs. Both preservation of the public health and protection against fire were involved in this undertaking. The total amount received by the plaintiffs from this source in 1917 was $563.69.

Buffalo, New York.—The plaintiff Eddy was a member of a commission or board of consulting engineers, consisting of Dr. Herring and Mr. Fuller of New York, and Mr. Eddy, employed by the city of Buffalo and Niagara Falls and the Town of La Salle, relative to the pollution of the Niagara River. The services were terminated by the filing of our report. Payment was on a per diem basis, and the amount received from this source in 1917 was $1,945.18.

[fol. 15] Plainfield, New Jersey.—This was the investigation for the city of a sewage-treatment plant which it was contended would become a nuisance; the service was paid for at per diem rates, and the amount received from this source in 1917 was $25.50.

Billerica, Massachusetts.—This consisted of the examination for the town of the condition of the stand-pipe which furnished the storage for water for domestic and fire purposes, to see whether it was in safe condition or what should be done to make it safe. The amount received for this service was $143.75.

Framingham, Massachusetts.—This consisted of the review for the city of plans and designs which had been previously prepared for the sewers and sewage-treatment plant, and was performed by a board of engineers consisting of Mr. Eddy and two others. The amount received from this source was $1,588.57.

Lynn, Massachusetts.—A part of the business section of the City of Lynn lies in a hollow and was subject to damaging floods in time of storm. A committee of the City Council reported in 1916 recommending that the City Engineer be authorized to make studies and gather data, and that—

"Harrison P. Eddy of the firm of Metcalf & Eddy, consulting engineers, of Boston, and Charles B. Breed, of Lynn be employed from time to time to check up this data and from it to work out eventually a plan for the solution of the entire storm water difficulty for the city."

The City Council accepted and adopted the recommendation and made the necessary appropriation, and the situation was studied and relief devised by a board consisting of Mr. Eddy, Mr. Breed, and the City Engineer. Mr. Eddy's employment lasted four or five years. The regular employees of the city worked under the direction of the [fol. 16] board and more particularly under the direction of Mr. Eddy. The members of the board were paid at per diem rates; the total amount received by the plaintiffs from this source in 1917 was $5,449.

Torrington, Connecticut.—Torrington had a City Engineer who had prepared a plan for a sewer system, and the municipal authorities wished to have that checked up to see if it was the most suitable and economical solution of their problem, and the plaintiff Eddy was called in for that work. The service was paid for at per diem rates, the amount received being $270.73.

In all of the foregoing cases the services for which the plaintiffs were employed were such as are usually performed by the City Engineer of a city, provided the City Engineer has the requisite professional skill; and in each case the employment of the plaintiffs involved the use of judgment and discretion by them and they were required to use their best professional skill to bring about a desired result.

The plaintiffs took no oath of office in any one of the cases, were free at all times to accept or refuse employment from all classes of people.

In the cases where one or the other of the plaintiffs individually, as distinguished from the firm, appears as the contracting party with the municipality or state, the proceeds of such contract were in all cases turned in to the partnership account by the individual recipient, this being in accordance with the requirements of the partnership agreement.

The gross income of the plaintiffs from all sources for 1917 was $93,356.93. Their gross income from said state and municipal business for 1917 was $39,010.25. Their total expenses for the year were $55,729.69. The ratio of total expenses to total receipts was 59.7 per [fol. 17] cent, and it was this ratio which was used in pro rating the total expense in order to determine the net income from state and municipal business. The above total of state and municipal gross receipts is made up of the items of income specified and described in this bill of exceptions together with two other items of such receipts, from the Kennebec Water District and the North Shore Sanitary District, which the Court in its findings and opinion held to be non-taxable. The total net income from said municipal and state business for the year 1917, ascertained in the manner above described, was $15,721.13, and it was this amount on which the additional tax was assessed.

The payment of the additional tax alleged in the declaration was made by check with the words "Paid under protest" endorsed on the face thereof at the time the check was sent to the defendant. That there was also sent with the check the notice received by the plaintiffs from the office of the Collector of Internal Revenue that the said amount of additional tax was payable and that demand for payment thereof within twenty days was thereby made. Said notice and demand also contained a notice to the effect that unless the amount stated was paid with- the twenty days, an officer would come and seize their property.

The foregoing constitutes all of the facts material to the questions of law to which plaintiffs' exceptions relate.

Upon the close of the evidence and before final argument, the plaintiffs submitted the following requests for rulings:

1. The United States has no power to tax the instrumentalities which a state employs to preserve and protect the health of its people.

2. The Revenue Act of 1917 must be construed and applied in accordance with the principle that the United States has no power [fol. 18] to tax the instrumentalities which a state may employ to preserve and protect the health of its people.

3. A state may use such instrumentalities as it sees fit to carry out the governmental functions allotted to it by the Constitution, and the United States can not interfere with its choice, and declare that it will tax certain of such instrumentalities and not others.

4. The compensation paid by a state or one of its political subdivisions to consulting civil engineers, engaged to advise it or to direct its action with reference to sewerage systems of water supply plants in order that the health of the people may be preserved and protected, is not subject to taxation by the United States.

5. The plaintiffs as a partnership or as individuals were officers or employees of one or more states or political subdivisions of states within the meaning of the Revenue Act of 1917.

6. Liability to federal taxation on compensation for personal services paid by states and political subdivisions of states does not depend upon the permanence of the employment but upon the nature of the services performed.

7. If the individual members of a partnership receive income for personal services which is not taxable by the United States, and in pursuance of their partnership agreement turn such income over to the partnership, such income is not taxable to the partnership.

8. The compensation received by the plaintiffs from the City of Marlboro is not taxable.

9. The compensation received by the plaintiffs from the Commonwealth of Massachusetts for inspecting the sewage treatment plant at the Medfield State Hospital is not taxable.

10. The compensation received by the plaintiffs from the Commonwealth of Massachusetts for preparing designs for sewage treat-[fol. 19] ment additions at the Medfield State Hospital is not taxable.

11. The compensation received by the plaintiffs from the commonwealth of Massachusetts for investigating the relocation of the sewage treatment plant at the Medfield State Hospital is not taxable.

12. The compensation received by the plaintiffs from the City of Schenectady is not taxable.

13. The compensation received by the plaintiffs from the Kennebec Water District is not taxable.

14. The compensation received by the plaintiffs from the City of Milwaukee is not taxable.

15. The compensation received by the plaintiffs from the City of New Haven is not taxable.

16. The compensation received by the plaintiffs from the City of Dayton for investigating and reporting on the water-works system is not taxable.

17. The compensation received by the plaintiffs from the City of Dayton for designing and supervising the construction of a reservoir is not taxable.

18. The compensation received by the plaintiffs from the Village of Canton is not taxable.

19. The compensation received by the plaintiffs from the Village of Sherburne is not taxable.

20. The compensation received by the plaintiffs from the North Shore Sanitary District is not taxable.

21. The compensation received by the plaintiffs from the City of Buffalo is not taxable.

22. The compensation received by the plaintiffs from the Town of Billerica is not taxable.

23. The compensation received by the plaintiffs from the Town [fol. 20] of Framingham is not taxable.

24. The compensation received by the plaintiffs from the City of Lynn is not taxable.

25. The compensation received by the plaintiffs from the Town of Torrington is not taxable.

26. On all the evidence, judgement must be entered for the plaintiffs for at least part of the amount sued for.

27. The plaintiffs have complied with all the procedural requirements for maintaining their action, and if any part of the income which was subject to the additional assessment was not properly taxable, they may recover the tax thereon in this proceeding.

28. The constitution contemplates an indestructible union composed of indestructible states.

Texas v. White, 7 Wall. 700, 725.
Lane County v. Oregon, 7 Wall. 71, 76.
The Collector v. Day, 11 Wall. 113, 125, 127.

29. The power to tax involves the power to destroy the subject of the tax.

McCulloch v. Maryland, 4 Wall. 316.
Veazle Bank v. Fenno, 8 Wall. 533.
Collector v. Day, 11 Wall. 113, 127.

30. The great law of self preservation inherent in the constitution impliedly exempts from taxation by the United States the agencies, means and instrumentalities employed by the States to execute the powers reserved to them by constitution.

The Collector v. Day, 11 Wall. 113, 127.
United States v. Railroad Co., 17 Wall. 322, 327.
Ambrosini v. United States, 187 U. S. 1, 7.

[fol. 21] 31. Counties, cities, towns, villages, water districts, fire districts, and sewerage districts are governmental agencies of the States which create them, and as such exempt from taxation by the United States.

United States v. Railroad Co., 17 Wall. 322.
Farmers & M. Sav. Bank v. Minnesota, 232 U. S. 516.
Logan County v. U. S., 169 U. S. 255, 256.

32. The right of the states to select the means, agencies and instrumentalities by which they will execute their reserved powers cannot be taxed by the United States.

United States v. Railroad, 17 Wall. 322, 327.

33. Both the officers and employees selected by a State or any political subdivision thereof to execute its reserved powers, and also the compensation paid for such governmental service are governmental instrumentalities which cannot be taxed by the United States.

The Collector v. Day, 11 Wall. 113.
Dobbins v. Commissioners of Erie County, 16 Pet. 435.

34. One who is specially hired by a state or political subdivision thereof to perform a particular governmental service is to that extent a governmental instrumentality and neither the service itself nor the compensation paid out of the public funds therefor can be taxed by the United States.

35. The means selected by a state to execute its police power—the power to provide for the public safety, public health, and in a limited sense the public welfare—cannot be taxed by the United States. [fol. 22] Ambrosini v. United States, 187 U. S. 1.

36. The power of the States to provide for the public health and safety includes power to provide instrumentalities to extinguish fire. Workmen v. New York City, 179 U. S. 532, 564.

37. One who is hired by a political subdivision of a state to devise and supervise, the installation of a municipal system for providing water to extinguish fire performs a governmental service the compensation for which (if paid out of public funds) cannot be taxed by the United States.

38. One hired by a political subdivision of a state to test its public water supply for purity and to devise and supervise the installation of a municipal system for protecting it from pollution and preventing it from spreading disease performs a governmental service the compensation for which (if paid out of public funds) cannot be taxed by the United States.

39. One hired by a state or by a political subdivision of a state to devise and supervise the installation of a public or municipal sewerage system designed to protect the public from disease performs a governmental service the compensation for which (if paid out of public funds) cannot be taxed by the United States.

Thereafter, on May 21, 1924, the court filed its findings and opinion, which *is* set forth as follows:

"LOWELL, J.;

This is a suit to recover excess profit taxes paid under protest. The plaintiffs were members of a firm of consulting engineers who advised various states, municipalities and water and sewerage districts throughout the country as to the installation of water works and sewerage systems. The manner of their employment and their rate of compensation differed somewhat. They were consulted either [fol. 23] on a specific problem, for which a fixed sum was paid, employed on a yearly salary or for compensation based on the amount of work done. In two cases, however, which will be referred to hereafter, their employment was on a different basis. The plaintiffs were assessed the sum of $1,259.26 for the year 1917 as excess profits on this kind of work. They paid under protest, and are now suing to recover. The statute then in force excepted various officers in the following words:

"This title shall apply to all trades or businesses of whatever description, whether continuously carried on or not, except—

(a) In the case of officers and employees under the United States, or any State, territory or the District of Columbia, or any local subdivision thereof, the compensation or fees received by them as such officers or employees." War Revenue Act of 1917, 201.

It is contended by the plaintiffs that they were officers or employees within the meaning of the statute. I am of the opinion, however, that the officers or employees contemplated in the exception were regular employees of a state or sub-division thereof, and not persons whose services were made use of as consultants, and who were not in any sense a part of the regular force of such state or sub-division.

U. S. v. Germaine, 99 U. S. 508.
Sherburn v. Hooper, 40 Mich. 503.

In two instances the plaintiffs were appointed regular officials of a sub-division of a state. Mr. Metcalf was chosen Chief Engineer of the Kennebec Water District, which was established to provide a healthful water supply for the inhabitants of the district, and Mr. Eddy was a member of the Board of Engineers of the North Shore Sanitary District in Illinois, appointed under an ordinance for the purpose of protecting the waters of Lake Michigan from contamination. These two instances, in my opinion, come within the exception of the statute.

The further contention as to the greater part of the services rendered by the plaintiffs is that although the plaintiffs were not in [fol. 24] terms excepted by the statute, the National Government has no right under the constitution to interfere with the sovereign powers of a state or sub-division thereof when they relate to a governmental function such as the preservation of the public health. In the present state of the law this question must be divided into two parts. In the first place as to the services rendered for water supply. While the provision of water for the extinguishment of fire is a public purpose.

Tainter v. Worcester, 123 Mass. 311.
Brinkmayer v. Evansville, 29 Ind. 187.
Wheeler v. Cincinnati, 19 O. St. 19.

The highest authority shows that the provision of water for the general purposes of the inhabitants of a city or town is not a public purpose. 2 Nichols, Eminent Domain, 2d ed. p. 1382. As to the services, therefore, rendered in connection with the provision of water supply or the maintenance and repair of water system, the Government had power to tax, and there can be no recovery.

There remains the question of the tax in connection with the services rendered for sewerage systems. The provision of a system of sewers has been held to be so connected with the public health as to be part of the governmental function of a municipality.

Johnston v. District of Columbia, 118 U. S. 19.
Child v. Boston, 4 Allen 41, 51.

The interesting and delicate question remains whether as to these services the National Government has the power to tax when they are rendered by persons not in the employ of the state or a subdivision thereof. It is earnestly and eloquently argued that to allow such a power of taxation would interfere with the sovereign power of the state to look out for the welfare of its inhabitants, and it is further insisted that if such a tax can be levied it might be made at such a [fol. 25] high rate as to practically destroy the power of the state to carry on its governmental functions. See Flint v. Stone-Tracey Co., 220 U. S. 108, 157; Bettman v. Warwick, 108 F. R. 46. But it is of the utmost importance that the power of taxation of the National Government should not be unduly restricted; see So. Carolina v. U. S. 199 U. S. 437, 457, and I am of the opinion that the taxing of the income of private persons, although arising from services rendered to a state, does not so seriously interfere with the governmental functions of the state as to be unconstitutional.

It was ingeniously argued at the Bar that the services rendered in many instances by the plaintiff were the same services as those of city or town engineers; that such city or town engineers could not be taxed under the statute, and that therefore the plaintiffs could not be taxed. It was suggested that the statute could be complied with by the simple expedient of making the plaintiffs in every case public officials. This was not done, however, except in the instances which I have mentioned. If the appointment were made clearly as a subterfuge in order to defeat the tax, it would not be valid, and the true distinction seems to be that already,—that states or public officials thereof cannot be taxed, while private persons, though rendering similar services, may be taxed.

The plaintiffs may recover the amount of the tax paid by them on the excess profits arising from their services in connection with the Kennebec Water District and the North Shore Sanitary District, but are not entitled to recover for anything else."

The court refused to allow any of plaintiffs' said requests for rulings, but gave its only rulings as indicated in the foregoing opinion. The plaintiffs duly claimed and saved exceptions severally [fol. 26] to the said several refusals of the court to allow each of said requests severally.

The plaintiffs further duly claimed and saved exceptions severally to the following rulings and findings of the Court as the same are set forth in its findings and opinion:

1. To the Court' ruling "that the officers or employees contemplated in the exception (in the statute) were regular employees of a state or subdivision thereof, and not persons whose services were made use of as consultants, and who were not in any sense a part of the regular force of such state."

2. To the Court's ruling that "As to the services, therefore, rendered in connection with the provision of water supply or the maintenance and repair of water systems, the government had power to tax, and there can be no recovery."

3. To the Court's ruling "that the taxing of the income of private persons, although arising from services rendered to a state, does not so seriously interfere with the governmental functions of the state as to be unconstitutional."

4. To the Court's ruling "that the true distinction seems to be that states or public officials thereof cannot be taxed, while private persons, though rendering similar services, may be taxed."

5. To the Court's ruling whereby it impliedly held that the connection of certain of plaintiff's services with water works systems, instead of the connection of such services with the exercise by the state or political sub-division of its legislative or executive functions on matters in which water works problems were involved, determined the taxable status of such income.

6. To the Court's finding that the plaintiffs "are not entitled [fol. 27] to recover" on the items of income specified in this bill of exceptions.

The plaintiffs being aggrieved by the Courts' said rulings and findings and failures to grant plaintiffs' said requests for rulings, submit this their bill of exceptions, and pray that the same may be allowed.

By Their Attorneys, (Sgd.) Philip Nichols, Edwin H. Abbot, Jr., J. A. Boyer.

We consent to the approval and allowance of the foregoing substituted bill of exceptions, the same to be substituted in the place of the plaintiff's original proposed bill of exceptions filed herein on June 13, 1924.

(Sgd.) Robert O. Harris, U. S. Attorney, Albert F. Welsh, Ass't. U. S. Attorney, Attorneys for Defendant.

Approved and allowed as plaintiffs' substituted bill of exceptions, the same being substituted by the plaintiffs in the place of their originally proposed bill of exceptions filed herein on June 13, 1924, this 15th day of September, 1924.

(Sgd.) James A. Lowell, District Judge.

[fol. 28] IN UNITED STATES DISTRICT COURT

DEFENDANT'S SUBSTITUTED BILL OF EXCEPTIONS AND ORDER SETTLING SAME—Draft bill filed June 13, 1924; substituted bill filed and allowed September 15, 1924

This is an action of contract brought by Leonard Metcalf and Harrison P. Eddy, copartners, doing business under the firm name and style of Metcalf and Eddy, against John J. Mitchell, former Collector of Internal Revenue for the Third District of Massachusetts, to recover excess profits taxes in the sum of $1,257.69, alleged to have been erroneously assessed and collected under the provisions of the Revenue Act of 1917.

The action was before the court on the declaration of the plaintiffs filed on March 29, 1923. A general denial was filed by the defendant to the declaration of the plaintiffs, and subsequently withdrawn, and specific answer substituted therefor, and after issue joined a stipulation was entered into between the parties hereto by their respective attorneys, waiving a trial by jury, and the action was tried before Honorable James A. Lowell, without a jury. The evidence before the trial court established the following facts:

1. The plaintiffs were copartners under the name of Metcalf [fol. 29] and Eddy, with offices in Boston, Massachusetts, practicing the profession of consulting civil engineers, specializing in the design, construction, supervision and management of water works and sewerage systems, and that part of their services were performed for States and political subdivisions of States, and such services were paid for in different ways by the States and political subdivisions of States, for whom the services were rendered.

2. The Kennebec Water District, in Maine, is a political subdivision of the state, incorporated by a special act of the state legislature in 1899 to provide a water supply for the people of the district. There was a very serious typhoid epidemic in the district due to the fact that the water was taken from a polluted source, and it was desired to go to a more distant, unpolluted source which would be safe for the community. In 1904 Mr. Metcalf was engaged to act as Chief Engineer of the district and has continued as such up to the present time. He has done practically all of the engineering work of the district. The work done in 1917 was the design and supervision of construction of a 22,000,000 gallon water reservoir and the preparation of plans for the installation of a large pump for increasing the water delivery capacity. The construction of the reservoir was done by a third party under a contract with the district. Payment was on a per diem basis with bills rendered monthly, and the total amount received from this source in 1917 was $3,626.02.

3. The North Shore Sanitary District was a public corporation including four or five communities north of Chicago, established by the state of Illinois as a political subdivision thereof to provide for the disposal of the sewage of the district and the protection of the lake [fol. 30] waters from which the water supply of these communities was taken. The service involved consisted of investigating, determining, and reporting to the district as to the best method of disposing of the sewage in such a manner that it would not contaminate the lake waters. This service was performed by a Board of Engineers consisting of the plaintiff Eddy and two others appointed by virtue of an ordinance of the district, which provided further that the salary or compensation of each of said members of said Board of Engineers for the performance of the duties and the work specified in this ordinance shall be the sum of $2,000 payable at the rate of $200 per

here was an office to which there was a fixed salary month until the sum of $1,000 shall have been paid each member, and the balance on the final termination of their employment. The total amount received by the plaintiffs from this source in 1917 was $178.05.

The foregoing constitutes all the facts material to the questions of law to which defendant's exceptions relate.

The Court filed an opinion, which is incorporated herein by reference and made a part of this bill of exceptions, wherein the Court ruled that the plaintiffs may recover the amount of the tax paid by them on the excess profits arising from their services in connection with the Kennebec Water District and the North Shore Sanitary District, and that in each of said cases the plaintiffs were regular officials of a political subdivision of a State within the meaning of the statute.

To the ruling of the Court that the plaintiffs may recover the amount of the tax paid by them on the excess profits arising from compensations derived from services in connection with the Kennebec Water District; to the ruling of the Court that the compensation received by Leonard Metcalf as chief engineer of the Kennebec Water District for the year 1917 and by him paid to the firm of [fol. 31] Metcalf & Eddy was compensation of the firm of Metcalf & Eddy, received by such firm from a political subdivision of a State and exempt from excess profits tax; to the ruling of the Court that the plaintiffs may recover the amount of the tax paid by them on the excess profits arising from the compensation derived from the services in connection with the North Shore Sanitary District in Illinois, and to the ruling of the Court that the compensation received by Harrison P. Eddy as a member of the Board of Engineers for the North Shore Sanitary District in Illinois for the year 1917, and by Harrison P. Eddy paid to the firm of Metcalf & Eddy, was compensation of the firm of Metcalf & Eddy, received by such firm from a political subdivision of a State and exempt from excess profits tax; and to the ruling of the court that the plaintiffs were officers or employees of a political subdivision of a State within the meaning of the Statute, the defendant duly excepted.

And the defendant, being aggrieved by said ruling, files this his bill of exceptions and prays that it may be allowed.

Robert O. Harris, United States Attorney. (Sgd.) Albert F. Welsh, Assistant U. S. Attorney.

The plaintiffs consent to the approval and allowance of the defendant's foregoing substituted bill of exceptions.

(Sgd.) Philip Nichols, Edwin H. Abbot, Jr., J. A. Boyer, Attorneys for Plaintiffs.

Approved and allowed as Defendant's substituted bill of exceptions.

(Sgd.) James A. Lowell, District Judge.

[fol. 32] IN UNITED STATES DISTRICT COURT

STATEMENT OF OPINION—May 21, 1924

(MEMORANDUM.—Copy of the opinion is here omitted as it already appears as part of the plaintiff's substituted bill of exceptions and will be found printed on pages 22-25 of this Transcript of Record. James S. Allen, Clerk.)

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed September 22, 1924

To the Honorable James A. Lowell, Judge of said Court:

The petition of Leonard Metcalf and Harrison P. Eddy, plaintiffs in the above styled cause, respectfully shows:

1. That on the 22nd day of September, 1924, the judgment of said court was rendered in said cause pursuant to findings made therein by the Honorable James A. Lowell and handed down on the 21st day of May, 1924, after trial of said cause before him without a jury, the right to trial by jury having duly waived in writing by both parties thereto.

2. That said judgment and findings allow your petitioners to recover only part of the funds sought to be recovered by them in said suit, and that said judgment is a judgment against your petitioners on the remaining, and major part of said funds thus sought by them to be recovered.

3. That your petitioners consider and allege that errors of law were committed by the Court in reaching the said findings on which said judgment against your petitioners was rendered, that such errors prejudiced the rights of your petitioners in said suit and the subject matter thereof, and that your petitioners are aggrieved by said alleged errors of law, the findings rendered pursuant thereto, and the said judgment rendered thereon against your petitioners as to the said major part of the subject matter of said suit.

4. That your petitioners exhibit to the Court herewith their proposed assignments of error which they file herewith.

5. That, as shown by said proposed assignments of error, the questions of law raised in said cause involve the construction and application of the Constitution of the United States, to wit, that part thereof which impliedly forbids the taxation by the Federal Government of instrumentalities of government utilized by a State Government, and [fol. 33] further involves the constitutionality of a law of the United States, to wit, Sec. 201 of Title II of the Revenue Act, of 1917, under the principles of the Constitution just above set forth.

Wherefore your petitioners pray that a writ of error from the Supreme Court of the United States may issue for the correction of errors so complained of and that they be allowed to bring up for review before the said Supreme Court of the United States the said judgment of the said District Court of the United States in and for the District of Massachusetts; and your petitioner will ever pray, etc.

Leonard Metcalf, Harrison P. Eddy, Petitioners, by Philip Nichols, Edwin H. Abbot, Jr., J. A. Boyer, Their Attorneys.

Petition for writ of error allowed this 22nd day of September, 1924.

James A. Lowell, Judge of District Court of U. S., District of Massachusetts.

[fol. 34] IN UNITED STATES DISTRICT COURT

PLAINTIFFS' ASSIGNMENTS OF ERROR—Filed September 22, 1924

And now comes Leonard Metcalf and Harrison P. Eddy, plaintiffs in error, and make and file these their assignments of error:

1. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: A state may use such instrumentalities as it sees fit to carry out the governmental functions allotted to it by the Constitution, and the United States cannot interfere with its choice, and declare that it will tax certain of such instrumentalities and not others.

2. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation paid by a state or one of its political subdivisions to consulting civil engineers, [fol. 35] engaged to advise it or direct its action with reference to sewerage systems or water supply plants in order that the health of the people may be preserved and protected, is not subject to taxation by the United States.

3. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The plaintiffs as a partnership or as individuals were officers or employees of one or more states or political subdivisions of states within the meaning of the Revenue Act of 1917.

4. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: Liability to federal taxation on compensation for personal services paid by states and political subdivisions of states does not depend upon the permanence of the employment but upon the nature of the services performed.

5. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: If the individual member of a partnership receive income for personal services which is not taxable by the United States, and in pursuance of their partnership agree-

ment turn such income over to the partnership, such income is not taxable to the partnership.

6. The district Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensatoion received by the plaintiffs from the City of Marlboro is not taxable.

7. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the Commonwealth of Massachusetts for inspecting the sewage treatment plant at the Medfield State Hospital is not taxable.

[fol. 36] The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the Commonwealth of Massachusetts for preparing designs for sewage treatment additions at the Medfield State Hospital is not taxable.

9. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the Commonwealth of Massachusetts for investigating the relocation of the sewage treatment plant at the Medfield State Hospital is not taxable.

10. The District Court erred in refusing to allow plaintiff's request that the following ruling be given: The compensation received by the plaintiffs from the City of Schenectady is not taxable.

11. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the City of Milwaukee is not taxable.

12. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the City of New Haven is not taxable.

13. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the City of Dayton for investigating and reporting on the waterworks system is not taxable.

14. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the City of Dayton for designing and supervising the construction of a reservoir is not taxable.

[fol. 37] 15. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the Village of Canton is not taxable.

16. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the Village of Sherburne is not taxable.

17. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the City of Buffalo is not taxable.

18. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the Town of Billerica is not taxable.

19. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the Town of Framingham is not taxable.

20 The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the City of Lynn is not taxable.

21. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: The compensation received by the plaintiffs from the Town of Torrington is not taxable.

22. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: Both the officers and employees that the following ruling be given: The compensation received by selected by a State or any political subdivision thereof to execute governmental service are governmental instrumentalities which can- [fol. 38] its reserved powers, and also the compensation paid for such not be taxed by the United States.

23. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: One who is specially hired by a state or political subdivision thereof to perform a particular governmental service is to that extent a governmental instrumentality, and neither the service itself nor the compensation paid out of public funds therefor can be taxed by the United States.

24. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: One who is hired by a political subdivision of a state to devise and supervise the installation of a municipal system for providing water to extinguish fire performs a governmental service the compensation for which (if paid out of public funds) cannot be taxed by the United States.

25. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: One hired by a political subdivision of a state to test its public water supply for purity and to devise and supervise the installation of a municipal system for protecting it from pollution and preventing it from spreading disease performs a governmental service the compensation for which (if paid out of public funds) cannot be taxed by the United States.

26. The District Court erred in refusing to allow plaintiffs' request that the following ruling be given: One hired by a political subdivision of a state to devise and supervise the installation of a public or municipal sewerage system designed to protect the public

from disease performs a governmental service the compensation for [fol. 39] which (if paid out of public funds) cannot be taxed by the United States.

27. The District Court erred in its ruling "that the officers or employees contemplated in the exception (in the statute) were regular employees of a state or subdivision thereof, and not persons whose services were made use of as consultants, and who were not in any sense a part of the regular force of such state."

28. The District Court erred in its ruling, "As to the services, therefore, rendered in connection with the provision of water supply or the maintenance and repair of water systems, the government had power to tax, and there can be no recovery."

29. The District Court erred in its ruling "that the taxing of the income of private persons, although arising from services rendered to a state, does not so seriously interfere with the governmental functions of the state as to be unconstitutional."

30. The District Court erred in its ruling "that the true distinction seems to be that states or public officials thereof cannot be taxed, while private persons though rendering similar services, may be taxed."

31. The District Court erred in its ruling whereby it impliedly held that the connection of certain of plaintiffs' services with water works systems, instead of the connection of such services with the exercise by the state or political subdivision of its legislative or executive functions on matters in which water works problems were involved, determined the taxable status of such income; such implication being contained in the following rulings of the Court: "The highest authority shows that the provision of water for the general [fol. 40] purposes of the inhabitants of a city or town is not a public purpose. As to the services, therefore, rendered in connection with the provision of water supply or the maintenance and repair of water systems, the government had power to tax, and there can be no recovery."

The District Court erred in its ruling that the plaintiffs "are not entitled to recover" on the items specified in the bill of exceptions.

(Sgd.) Philip Nichols, Edwin H. Abbot, Jr., J. A. Boyer,
Attorneys for Plaintiffs in Error.

[fol. 41] IN UNITED STATES DISTRICT COURT

DEFENDANT'S PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed September 22, 1924

Now comes John J. Mitchell, late Collector of Internal Revenue, in the above-entitled cause and says that on or about the twenty-second day of September, 1924, this court entered judgment herein, in which judgment and proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of the defendant, which appear herein of record;

Wherefore the defendant prays that a writ of error may issue in his behalf out of the United States Supreme Court for the correction of errors so complained of and that a transcript of the record and proceedings in this case, duly authenticated, may be sent to said United States Supreme Court.

Robert O. Harris, United States Attorney. (Sgd.) Albert F. Welsh, Assistant U. S. Attorney.

Petition allowed by James A. Lowell, Judge of District Court.

[fol. 42] IN UNITED STATES DISTRICT COURT

DEFENDANT'S ASSIGNMENT OF ERRORS—Filed September 22, 1924

Now comes John J. Mitchell, late Collector of Internal Revenue, defendant in the above-entitled cause, who has filed herewith his petition for a writ of error, and to review the judgment thereon entered in said cause on the twenty-second day of September, 1924, makes and files the following assignment of errors which he avers to have occurred in the proceedings in this cause, and upon which he will rely for reversal of said judgment, to wit.

1. The Court erred in ruling that the plaintiffs may recover the amount of the tax paid by them on the excess profits arising from compensation derived from services in connection with the Kennebec Water District;

2. The Court erred in ruling that the compensation received by Leonard Metcalf, as Chief Engineer of the Kennebec Water District for the year 1917, and by him paid to the firm of Metcalf & Eddy, was compensation of the firm of Metcalf & Eddy received by said firm from a political subdivision of a state and exempt from excess profits tax;

3. The Court erred in ruling that the plaintiffs may recover the amount of the tax paid by them on the excess profits arising from [fol. 43] the compensation derived from services in connection with the North Shore Sanitary District in Illinois;

4. The Court erred in ruling that the compensation received by Harrison P. Eddy, as a member of the Board of Engineers of the North Shore Sanitary District of Illinois for the year 1917 and by Harrison P. Eddy paid to the firm of Metcalf & Eddy, was compensation to the firm of Metcalf & Eddy received by such firm from a political subdivision of a state and exempt from excess profit tax;

5. The Court erred in ruling that the plaintiffs were officers or employees of a political subdivision of a state within the meaning of the statute.

Robert O. Harris, United States Attorney. (Sgd.) Albert F. Welsh, Assistant U. S. Attorney.

[fol. 44] IN UNITED STATES DISTRICT COURT

WAIVER OF BONDS—Filed September 22, 1924

Whereas both parties in the above styled suit are taking writ of error from the judgment therein rendered, it is hereby agreed by said parties that each waives the giving by the other of any bond for costs or supersedeas and agrees that said writs of error may be taken and prosecuted without the giving of any such bond by either party, and plaintiff agrees to treat said judgment as superseded pending decision on said writs of error.

Philip Nichols, Edwin H. Abbot, Jr., J. A. Boyer, Attorneys for Plaintiff. Robert O. Harris, United States Attorney. Albert F. Welsh, Assistant U. S. Attorney.

[fol. 45] IN UNITED STATES DISTRICT COURT

STATEMENT RE TRANSCRIPT OF RECORD—Filed September 22, 1924

It is hereby agreed between the parties to the above styled cause (and the Clerk of said Court is hereby requested accordingly) that the portions of the record of said cause which, together with the proper recitals of proceedings therein, shall be incorporated in the transcript of the record on the writ of error sued out by the said plaintiffs in error and on the cross-writ of error sued out by the said defendant in error, shall be as follows:

1. Original writ and return thereon.
2. Plaintiffs' declaration.
3. Defendant's substituted answer.
4. Stipulation waiving trial by jury.
5. Findings and opinion of the court.

[fol. 46] 6. Plaintiffs' bill of exceptions.

7. Defendant's bill of exceptions.
8. Entry of judgment.
9. Plaintiffs' petition for writ of error.
10. Plaintiffs' assignment of error.
11. Plaintiffs' writ of error.
12. Plaintiffs' citation on writ of error.
13. Stipulation waiving cost and supersede as bonds.
14. Defendant's petition for cross-writ of error.

15. Defendant's assignments of error.
16. Defendant's writ of error.
17. Defendant's citation on writ of error.
18. This agreement as to the transcript.
19. Certificate of the clerk.

(Sgd.) Philip Nichols, Edwin H. Abbot, Jr., J. A. Boyer, Attorneys for Plaintiffs. Robert O. Harris, Albert F. Welsh, Attorneys for Defendant.

[fols. 47 & 48] CITATION—In usual form, showing service on Robert O. Harris et al.; omitted in printing

[fols. 49 & 50] CITATION—In usual form, showing service on Philip Nichols et al.; omitted in printing

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[fol. 51] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States, within and for the District of Massachusetts, certify that the foregoing are true copies of the papers agreed upon by the parties as constituting the record upon the return on writs of error in the cause entitled No. 2072, Law Docket, Leonard Metcalf et al., plaintiffs, v. John J. Mitchell, Former Collector of Internal Revenue, defendant, in said Disrict Court determined together with the original citations with the acknowledgments of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this twenty-sixth day of September, A. D. 1924.

James S. Allen, Clerk. (Seal.)

Endorsed on cover: File No. 30,638, 31,066. Massachusetts D. C. U. S. Term No. 183. Leonard Metcalf and Harrison P. Eddy, copartners under the name and style of Metcalf & Eddy, plaintiffs in error, vs. John J. Mitchell, former Collector of Internal Revenue for the District of Massachusetts. Filed September 30th, 1924. Term No. 376. John J. Mitchell, former Collector of Internal Revenue for the District of Massachusetts, plaintiff in error, vs. Leonard Metcalf and Harrison P. Eddy, copartners under the name and style of Metcalf & Eddy. Filed April 22nd, 1925. File No. 30,638, 31,066.

(4)

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CLERK

Supreme Court of the United States.

October Term, 1925.

No. 183.

Leonard Metcalf and Harrison P. Eddy, co-partners under the name and style of Metcalf & Eddy, Plaintiffs in Error,

v.

John J. Mitchell, Former Collector of Internal Revenue for the District of Massachusetts.

No. 376.

John J. Mitchell, Former Collector of Internal Revenue for the District of Massachusetts, Plaintiff in Error,

v.

Leonard Metcalf and Harrison P. Eddy, co-partners under the name and style of Metcalf & Eddy.

In Error to the District Court of the United States for the District of Massachusetts.

Brief for Plaintiffs in Error in No. 183 and for Defendants in Error in No. 376.

PHILIP NICHOLS,
JOSEPH A. [illegible],
Attorneys for [illegible].

[illegible]

11 37 [illegible]

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Supreme Court of the United States.

October Term, 1925.

No. 183.

LEONARD METCALF and HARRISON P. EDDY, copartners under the name and style of Metcalf & Eddy, *Plaintiffs in Error,*

v.

JOHN J. MITCHELL, Former Collector of Internal Revenue for the District of Massachusetts.

No. 376.

JOHN J. MITCHELL, Former Collector of Internal Revenue for the District of Massachusetts, *Plaintiff in Error,*

v.

LEONARD METCALF and HARRISON P. EDDY, copartners under the name and style of Metcalf & Eddy.

In Error to the District Court of the United States for the District of Massachusetts.

BRIEF FOR PLAINTIFFS IN ERROR IN NO. 183 AND FOR DEFENDANTS IN ERROR IN NO. 376.

REFERENCE TO OFFICIAL REPORT.

The opinion of the United States District Court for the District of Massachusetts, from which the writ of error was taken, is reported in 299 Federal Reporter, 812.

STATEMENT OF GROUND OF JURISDICTION.

(1) *Date of judgment to be reviewed,* September 22, 1924 (Record, p. 8).

(2) *Specific claims advanced and rulings made in the lower court.* The plaintiffs made the specific claim with respect to twenty items of income that the United States had no power under the Constitution to tax such income; and that in any event the Revenue Act of 1917, under which the tax in question was levied, did not authorize the taxation of such income as appears by their thirty-nine requests for rulings (Record, pp. 13 to 16, inc.), set forth so far as now material in the specification of errors relied on, *infra,* p. 12. The court ruled that the Revenue Act did not authorize the taxation of two of the items, but did authorize the taxation of the remaining eighteen items, and that the United States had power under the Constitution to tax such items of income, and ordered judgment for the plaintiffs only for the amount of the tax on the two items so held not taxable (Record, pp. 16 to 18, inc.).

(3) *Reference to statute under which the jurisdiction of this court is invoked.* Section 238 of the Judicial Code, which provides that a case may be taken direct to the Supreme Court by writ of error from a District Court, if the case involves the construction or application of the Constitution of the United States or the constitutionality of any law of the United States.

(4) *Reference to cases believed to sustain the jurisdiction of this court.*

(*a*) That the unsuccessful litigant may come to this court direct in every case in which a claim has been made by him (substantial and that has not been decided by this court) that a statute which adversely affects his rights is in contravention of the Constitution of the United States.

> *Loeb* v. *Columbia Township Trustees,* 179 U.S. 482.

(*b*) That, when a case involving a question under the Constitution of the United States is brought directly to this court by writ of error from a District Court, the jurisdiction of this court is not limited to the constitutional question, but extends to the whole case.

Whitten v. *Tomlinson*, 160 U.S. 231, 238.
Penn Mutual Life Insurance Co. v. *Austin*, 168 U.S. 685.
Holden v. *Aultman*, 169 U.S. 81, 88, 89.
Green v. *Louisville &c. R.R. Co.*, 244 U.S. 499.
McCurdy v. *United States*, 246 U.S. 263, 269.

STATEMENT OF THE CASE.

This was an action of contract brought by the plaintiffs in error and cross-defendants in error, hereinafter called the plaintiffs, against John J. Mitchell, Former Collector of Internal Revenue for the Third District of Massachusetts, defendant in error and cross-plaintiff in error, hereinafter called the defendant, to recover an additional excess-profits tax of $1259.26 assessed upon and collected from them as partners with respect to their incomes as such in 1917. The pleadings presented just two issues: one, whether the payment of the additional tax, recovery of which was sought, was made under protest or duress; and second, whether the income which was the basis of the additional tax was subject to taxation by the federal government. Trial of these issues was had before the court without a jury, the right to trial by jury having been duly waived by written stipulation of the parties. The first of the two above-specified issues was eliminated as a material question under these writs of error, both the protest and duress having been definitely established as facts by the evidence.

On the remaining question as to the taxability of the income involved, the evidence established the following facts:

The plaintiffs were consulting civil engineers, co-partners, with their offices in Boston, Massachusetts. They specialized in the design, construction, supervision, and management of waterworks and sewerage systems. The part of their services which produced the income on which the tax in question was assessed was services rendered to states and political subdivisions thereof. The circumstances connected with each of the items of such income are as follows, with reference to the respective items:

1. *Marlboro, Massachusetts.* In 1909 the plaintiff Eddy was engaged in the City of Marlboro, under authority of chapter 312 of the Acts of the Massachusetts Legislature of 1888, to supervise the operation of the municipal sewage-treatment plant, and render periodical reports thereon to the Water and Sewer Board of the city, and his employment has continued without interruption to date; the caretaker of the plant, and other regular employees of the city, worked under Mr. Eddy's direction. Following a change in the basis of payment early in 1917 the compensation for these services was a stipulated sum of $40 a month. The total payments in 1917 aggregated $562.19.

2. *Commonwealth of Massachusetts.* In 1916 the plaintiffs were engaged by vote of the Trustees of the Medfield State Hospital, a state institution, to perform the periodic inspection and the supervision of the operation of the sewage-treatment plant at the hospital, and this service continued for a considerable period at an annual salary of $500. The work was similar to that performed for the City of Marlboro; Mr. Eddy visited the plant from time to time, took samples for chemical analysis, and gave instructions to the caretaker as to what he should do to improve the operation of his plant. The total amount received from this source in 1917 was $342.61.

3. *Commonwealth of Massachusetts.* In 1917 the firm of Metcalf & Eddy was engaged by the Trustees of the Medfield State Hospital to prepare designs for additions and improvements on the sewage-treatment plant. This work consisted of studying the design of the plant then in operation, deciding what improvements and enlargements ought to be made in the structures, and in preparing drawings upon which a contract for the enlargement and improvement of the plant could be based. The amount paid for this service was $850.

4. *Commonwealth of Massachusetts.* This item comprised the study of an alternative scheme to that covered by the previous item. It required the study of a new line of sewer from the hospital buildings to a location somewhat distant from the existing sewage-treatment plant, an estimate of cost, and recommendations to the State Department of Mental Diseases as to the advisability and desirability of substituting this site for the one then in use for the treatment plant. The amount received from this source was $865.94.

5. *Nahant, Massachusetts.* The plaintiffs were engaged by the town authorities to study the problem of additional fire protection, the insurance companies having advised the town to lay additional mains, and the plaintiffs laid out and advised the adoption of a program of pipe extensions to be made over a period of four or five years. The total charge for this service was $200; of this the amount allocated to 1917 was $51.10.

6. *Schenectady, New York.* This service comprised visits to the sewage-treatment plant at the City of Schenectady, examination of the plant, and conferences with the man in charge of the plant as to operating conditions, and advising him what changes or improvements should be made; and an examination of his monthly reports and comments thereon at like intervals. The employment began in 1916 and was at an annual salary of $1000, and

has continued, with one interruption, to the present time. It was based upon a resolution of the Board of Estimates and Appropriations of the city reading as follows:

> "Resolved: that the appropriation of $1000 from the item noted 'Salaries—Consulting Engineer' in the budget of the Bureau of Sewage Disposal for services to be rendered by Harrison P. Eddy of the firm of Metcalf & Eddy of Boston, as per his letter of February 3, 1916, which is made a part hereof, be and the same is hereby approved and concurred in by this Board."

This employment continued on the same basis from year to year, and the amount received therefrom in 1917 was therefore $1000.

7. *Milwaukee, Wisconsin.* This service consisted of a study of the sewage-disposal problem with particular reference to a plan for the treatment of the sewage before it was discharged into Lake Michigan, from which the water supply of the city was taken. This work was a continuation of work done by a board of consulting engineers, of which Mr. Eddy was a member some time prior to 1917. In 1917 Mr. Eddy received a telegram from the Chairman of the Sewage Commission of Milwaukee reading as follows:

> "The sewage commission has authorized me to select a consulting engineer to advise it as to the adequacy of plan outlined in chief engineer's report. Can you serve as such and how such?"

Mr. Eddy accepted the appointment and served continuously until October 18, 1921, when it was voted by the Sewage Commission—

> "to discontinue services of Harrison P. Eddy as consulting engineer for the commission, and thereafter to call upon his services only when specially required."

The total amount received from this source in 1917 was $9211.79.

8. *New Haven, Connecticut.* The service in this case was the examination of plans for a dam across a river, with tidegates to prevent the salt water from backing up, with a view to studying the sufficiency of the plans, and a report thereon to the Park Department of the city. The payment for this service was $100.

9. *Dayton, Ohio.* The plaintiff Metcalf had served the City of Dayton a number of years, and in 1917 he was engaged by the city to report on plans for meeting the danger of serious fire due to the fact that the city's water supply was derived from artesian wells, and on account of the variation in hourly use of water there might be no water available to extinguish fires occurring at certain times in the day; he met the situation by recommending the construction of a reservoir in a certain location. He was paid $100 per day for his services, and received from this source in 1917 the sum of $4320.28.

10. *Dayton, Ohio.* The plaintiffs were engaged to design, and supervise the construction by a third party under contract with the city, of the reservoir referred to in the preceding paragraph, receiving as compensation 6 per cent of the cost. The City Engineer did not have charge of this work, and Mr. Metcalf acted in effect as special City Engineer engaged for that particular work. The plaintiffs received from this source in 1917 the sum of $6112.23.

11. *Canton, New York.* One C. E. Perry, a civil engineer, had been engaged by the Village of Canton to supervise the construction of certain waterworks at a salary of $500 per month, the village to furnish such inspection and assistance as might be required. Mr. Perry having been called on for military service, by agreement with Mr. Perry and the municipal authorities the plaintiffs took over his position and compensation during his absence. The total

amount received by the plaintiffs from this source in 1917 was $1801.67.

12. *Sherburne, New York.* This was another of Mr. Perry's positions under which he was supervising the construction of auxiliary waterworks at a salary of $300 per month, and the duties and compensation were taken over by the plaintiffs. Both preservation of the public health and protection against fire were involved in this undertaking. The total amount received by the plaintiffs from this source in 1917 was $563.69.

13. *Buffalo, New York.* The plaintiff Eddy was a member of a commission or board of consulting engineers, consisting of Dr. Herring and Mr. Fuller of New York and Mr. Eddy, employed by the Cities of Buffalo and Niagara Falls and the Town of LaSalle, relative to the pollution of the Niagara River. The services were terminated by the filing of the report of the board. Payment was on a *per diem* basis, and the amount received from this source in 1917 was $1945.18.

14. *Plainfield, New Jersey.* This was the investigation of a sewage-treatment plant which it was contended would become a nuisance; the service was paid for at *per diem* rates, and the amount received from this source in 1917 was $25.50.

15. *Billerica, Massachusetts.* This consisted of the examination for the town of the condition of the standpipe which furnished the storage for water for domestic and fire purposes, to see whether it was in safe condition or what should be done to make it safe. The amount received for this service was $143.75.

16. *Framingham, Massachusetts.* This consisted of the review for the city of plans and designs which had been previously prepared for the sewers and sewage-treatment plant, and was performed by a board of engineers consisting of Mr. Eddy and two others. The amount received from this source was $1588.57.

17. *Lynn, Massachusetts.* A part of the business section of the City of Lynn lies in a hollow and was subject to damaging floods in time of storm. A committee of the City Council reported in 1916 recommending that the City Engineer be authorized to make studies and gather data, and that—

> "Harrison P. Eddy of the firm of Metcalf & Eddy, consulting engineers, of Boston, and Charles B. Breed, of Lynn be employed from time to time to check up this data and from it to work out eventually a plan for the solution of the entire storm water difficulty for the city."

The City Council accepted and adopted the recommendation and made the necessary appropriation, and the situation was studied and relief devised by a board consisting of Mr. Eddy, Mr. Breed, and the City Engineer. Mr. Eddy's employment lasted four or five years. The regular employees of the city worked under the direction of the board, and more particularly under the direction of Mr. Eddy. The members of the board were paid at *per diem* rates; the total amount received by the plaintiffs from this source in 1917 was $5449.

18. *Torrington, Connecticut.* Torrington had a City Engineer who had prepared a plan for a sewer system, and the municipal authorities wished to have the plan checked up to see if it was the most suitable and economical solution of their problem, and the plaintiff Eddy was called in for that work. The service was paid for at *per diem* rates, the amount received being $270.73.

19. *Kennebec Water District, Maine.* This district is a political subdivision of the state, incorporated by a special act of the state legislature in 1899 to provide a water supply for the people of the district. There was a very serious typhoid epidemic in the district due to the fact

that the water was taken from a polluted source, and it was desired to go to a more distant, unpolluted source which would be safe for the community. In 1904 Mr. Metcalf was engaged to act as Chief Engineer of the district and has continued as such up to the present time. He has done practically all of the engineering work of the district. The work done in 1917 was the design and supervision of construction of a 22,000,000-gallon reservoir and the preparation of plans for the installation of a large pump for increasing the water-delivery capacity. The construction of the reservoir was done by a third party under a contract with the district. Payment was on a *per diem* basis, with bills rendered monthly, and the total amount received from this source in 1917 was $3626.02.

20. *North Shore Sanitary District, Illinois.* This district was a public corporation including four or five communities north of Chicago, established by the state of Illinois as a political subdivision thereof to provide for the disposal of the sewage of the district and the protection of the lake waters from which the water supply of these communities was taken. The service involved consisted of investigating, determining, and reporting to the district upon the best method of disposing of the sewage in such a manner that it would not contaminate the lake waters. This service was performed by a board of engineers consisting of the plaintiff Eddy and two others, appointed by virtue of an ordinance of the district, which provided further that—

> "The salary or compensation of each of said members of said Board of Engineers for the performance of the duties and the work specified in this ordinance shall be the sum of $2000 payable at the rate of $200 per month until the sum of $1000 shall have been paid each member, and the balance on the final termination of their employment."

The total amount received by the plaintiffs from this source in 1917 was $178.05.

In all of the foregoing cases the services for which the plaintiffs were employed were such as are usually performed by the City Engineer of a city, provided the City Engineer has the requisite professional skill; and in each case the employment of the plaintiffs involved the use of judgment and discretion by them, and they were required to use their best professional skill to bring about a desired result.

The plaintiffs took no oath of office in any one of the cases, and were free at all times to accept or refuse employment from all other corporations and individuals.

In the cases where one or the other of the plaintiffs individually, as distinguished from the firm, appears as the person employed by the municipality or state, the proceeds of such employment were in all cases turned in to the partnership account by the individual recipient, in accordance with the requirements of the partnership agreement.

Upon the foregoing facts the court found for the plaintiffs as to two of the stated items of income, namely, the Kennebec Water District item and the North Shore Sanitary District item, and against the plaintiffs as to the remaining items, and judgment was entered accordingly. Writs of error were thereupon sued out by each of the parties as to the parts of the judgment by which they were respectively aggrieved, to present to the court the alleged errors to which exceptions had been duly saved.

The plaintiffs contend (1) that the United States cannot constitutionally tax the twenty items of income derived by the plaintiffs from states and political subdivisions of states; (2) that, even if it is within the constitutional power of the United States to tax income of this character, the statute does not authorize the taxation of some, if not all, of these items, because they constitute "compensation or fees'' received by the plaintiffs as ''officers or employees'' of ''a state . . . or any political subdivision thereof,'' which under the statute are not subject to taxation; (3) that, if the plaintiffs were exempt as individuals, they have not lost this exemption by reason of the fact that they were taxed as partners on their joint income.

The writ of error of the original plaintiffs raises these questions through requests for rulings of law and exceptions to the rulings of the trial court, as set forth more in detail in the specification of errors relied on, *infra,* with respect to the eighteen items of income held to be taxable. The writ of error of the original defendant raises these questions with respect to the two items of income held by the trial court not to be taxable.

For the purposes of a more orderly and convenient presentation of the case, the three issues raised by the two writs of error are treated together in the brief, and the three questions thus raised are presented in order. These are the only questions involved in the case.

SPECIFICATIONS OF ERRORS RELIED ON.

The errors assigned by the plaintiffs all relate to refusals of the court to allow requests for rulings, or to rulings given by the court. The requested rulings which the court refused to give, to which refusals exceptions were taken, and which were assigned as error, are as follows:

(1) A state may use such instrumentalities as it sees fit to carry out the governmental functions allotted to it by the Constitution, and the United States cannot interfere with its choice, and declare that it will tax certain of such instrumentalities, and not others.

(2) The compensation paid by a state or one of its political subdivisions to consulting civil engineers, engaged to advise or direct its action with reference to sewerage sys-

tems or water-supply plants in order that the health of the people may be preserved and protected, is not subject to taxation by the United States.

(3) The plaintiffs as a partnership or as individuals were officers or employees of one or more states or political subdivisions of states within the meaning of the Revenue Act of 1917.

(4) Liability to federal taxation on compensation for personal services paid by states and political subdivisions of states does not depend upon the permanence of the employment, but upon the nature of the services performed.

(5) If the individual members of a partnership receive income for personal services which is not taxable by the United States, and, in pursuance of their partnership agreement, turn such income over to the partnership, such income is not taxable to the partnership.

(6) The compensation received by the plaintiffs from the City of Marlboro is not taxable.

(7) The compensation received by the plaintiffs from the Commonwealth of Massachusetts for inspecting the sewage-treatment plant at the Medfield State Hospital is not taxable.

(8) The compensation received by the plaintiffs from the Commonwealth of Massachusetts for preparing designs for sewage-treatment additions at the Medfield State Hospital is not taxable.

(9) The compensation received by the plaintiffs from the Commonwealth of Massachusetts for investigating the relocation of the sewage-treatment plant at the Medfield State Hospital is not taxable.

(10) The compensation received by the plaintiffs from the City of Schenectady is not taxable.

(11) The compensation received by the plaintiffs from the City of Milwaukee is not taxable.

(12) The compensation received by the plaintiffs from the City of New Haven is not taxable.

(13) The compensation received by the plaintiffs from the City of Dayton for investigating and reporting on the waterworks system is not taxable.

(14) The compensation received by the plaintiffs from the City of Dayton for designing and supervising the construction of a reservoir is not taxable.

(15) The compensation received by the plaintiffs from the Village of Canton is not taxable.

(16) The compensation received by the plaintiffs from the Village of Sherburne is not taxable.

(17) The compensation received by the plaintiffs from the City of Buffalo is not taxable.

(18) The compensation received by the plaintiffs from the Town of Billerica is not taxable.

(19) The compensation received by the plaintiffs from the Town of Framingham is not taxable.

(20) The compensation received by the plaintiffs from the City of Lynn is not taxable.

(21) The compensation received by the plaintiffs from the Town of Torrington is not taxable.

(22) Both the officers and employees selected by a state or any political subdivision thereof to execute its reserved powers, and also the compensation paid for such governmental service, are governmental instrumentalities which cannot be taxed by the United States.

(23) One who is especially hired by a state or political subdivision thereof to perform a particular governmental service is to that extent a governmental instrumentality, and neither the service itself nor the compensation paid out of public funds therefor can be taxed by the United States.

(24) One who is hired by a political subdivision of a state to devise and supervise the installation of a municipal system for providing water to extinguish fire performs a governmental service the compensation for which (if paid out of public funds) cannot be taxed by the United States.

(25) One hired by a political subdivision of a state to test its public water supply for purity and to devise and supervise the installation of a municipal system for protecting it from pollution and preventing it from spreading disease performs a governmental service the compensation for which (if paid out of public funds) cannot be taxed by the United States.

(26) One hired by a political subdivision of a state to devise and supervise the installation of a public or municipal sewerage system designed to protect the public from disease performs a governmental service the compensation for which (if paid out of public funds) cannot be taxed by the United States.

The rulings given by the court, to which rulings exceptions were saved by the plaintiffs, and which were assigned as error by them, are as follows:

(27) Its ruling "that the officers or employees contemplated in the exception [in the statute] were regular employees of a state or subdivision thereof, and not persons whose services were made use of as consultants, and who were not in any sense a part of the regular force of such state."

(28) Its ruling, "As to the services, therefore, rendered in connection with the provision of water supply or the maintenance and repair of water systems, the government had power to tax, and there can be no recovery."

(29) Its ruling "that the taxing of the income of private persons, although arising from services rendered to a state, does not so seriously interfere with the governmental functions of the state as to be unconstitutional."

(30) Its ruling "that the true distinction seems to be that states or public officials thereof cannot be taxed, while private persons though rendering similar services, may be taxed."

(31) Its ruling whereby it impliedly held that the con-

nection of certain of plaintiffs' services with waterworks systems, instead of the connection of such services with the exercise by the state or political subdivision of its legislative or executive functions on matters in which waterworks problems were involved, determined the taxable status of such income; such implication being contained in the following rulings of the court: "The highest authority shows that the provision of water for the general purposes of the inhabitants of a city or town is not a public purpose. As to the services, therefore, rendered in connection with the provision of water supply or the maintenance and repair of water systems, the government had power to tax, and there can be no recovery."

(32) Its ruling that the plaintiffs "are not entitled to recover" on the items specified in the plaintiffs' bill of exceptions.

STATUTES MATERIAL TO THE CASE.

The statute under which the tax in controversy was assessed is the so-called War Revenue Act of 1917, approved by the President October 3, 1917, and in effect on the following day, and more specifically the portion of the act designated: "Title II—War Excess Profits Tax." This title includes sections 200 to 214, inclusive, of the act, and the material provisions of these sections are as follows:

Section 200 contains definitions, among them a provision that the terms "trade" and "business" include professions and occupations.

Section 201 imposes a tax based on the relation of net income to invested capital, and contains the following provision:

> "This title shall apply to all trades or businesses of whatever description, whether continuously carried on or not, except—

> "(a) In the case of officers and employees under the United States, or any State, territory or the District of Columbia, or any local subdivision thereof, the compensation *or fees* received by them as such officers or employees."

Section 206 provides that the net income of a partnership shall be ascertained and returned upon the same basis and in the same manner as provided in the Revenue Act of 1916, as amended by the War Revenue Act of 1917. In the Revenue Act of 1916, which is not amended in this particular by the Act of 1917, it is provided that the "compensation of all officers and employees of a State, or any political subdivision thereof . . . shall be exempt from the provisions of this title."

Section 209 provides as follows:

> "That in the case of a trade or business having no invested capital or not more than a nominal capital there shall be levied, assessed, collected and paid, in addition to the taxes under existing law and under this act, in lieu of the tax imposed by section 201, a tax equivalent to eight per centum of the net income of such trade or business. . . ."

It appears to have been assumed by all parties that the plaintiffs, so far as they were liable to taxation under the excess-profits tax, were taxable under section 209 rather than section 201. Inasmuch as the enumeration of subjects to which the excess-profits tax is not applicable, so far as it applied to officers and employees of a state or a subdivision thereof, is somewhat broader than the exemptions under the income-tax law, the former prevails.

Certain state statutes, applicable only to particular items of income, are set forth in connection with the argument on the items to which they respectively relate.

The decision of this case in the United States District

Court for the District of Massachusetts reported in 299 Federal Reporter, 812, is set forth in full on pages 16 to 18, inclusive, of the Record in this case.

ARGUMENT.

I.

It is the Constitution, and not merely the statute, which limits the federal taxing power.

It is the Constitution of the United States which imposes and defines the extent of the limitation on the power of the federal government to tax the means and instrumentalities by which the state governments exercise their strictly governmental functions.

McCulloch v. *Maryland*, 4 Wheat. 316.
Weston v. *Charleston*, 2 Pet. 449.
Dobbins v. *Commissioners of Erie County*, 16 Pet. 435.
+ *The Collector* v. *Day*, 11 Wall. 113.
United States v. *Baltimore &c. R.R. Co.*, 17 Wall. 322.
Pollock v. *Farmers' Loan & Trust Co.*, 157 U.S. 527.
Ambrosini v. *United States*, 187 U.S. 1.
South Carolina v. *United States*, 199 U.S. 437.
And many other cases.

The above-cited cases, which are quoted at length in the succeeding pages of this brief, decide that constitutional limitation of power to be as follows: that the federal government cannot tax the means, agencies, or instrumentalities by which a state or any political subdivision thereof exercises its governmental functions.

Such a constitutional limitation of power is self-executing, and therefore effectual and operative without the intervention or assistance of legislation.

Prigg v. *Pennsylvania,* 15 Pet. 421, 449.
Doon Township v. *Cummins,* 142 U.S. 366, 371.
Anniston City Land Co. v. *State,* 160 Ala. 253.

Therefore a federal statute which attempts to define the same limitation of power must be in conformity with the constitutional limitation of power. Such a statutory limitation, where there is a constitutional limitation, is merely declaratory, and can be valid only by virtue of its conformity with the constitutional limitation.

Doon Township v. *Cummins, supra.*
Van Brocklin v. *Tennessee,* 117 U.S. 151, 167.
Monongahela Navigation Co. v. *United States,* 148 U.S. 312, 327.
Evans v. *Gore,* 253 U.S. 245.

In actual operation such a statute, when in conformity with the Constitution, is only an unessential conduit through which the force of the constitutional limitation may flow. It is unessential as such conduit for the reason that the force of the constitutional limitation would not, and could not, be dammed even were such conduit completely lacking; nor can its force be partially dammed or diverted if such conduit be either partially lacking or misdirected. The conduit can be useful only by following the predetermined channel; it cannot itself determine the channel or influence the flow. The constitutional limitation of power is effectual regardless of the presence or absence of the legislative limitation, and regardless also of the terms of any attempted legislative limitation that may be present.

Such a legislative limitation is ineffectual as an operative law; it neither adds to nor detracts from the substance of the existing law. Its only purpose and effect is that of a recognition and interpretation by Congress of a constitutional limitation. A congressional interpretation of a constitutional limitation and its extent is not controlling, particularly as against a judicial determination thereof, such interpretation being peculiarly a function of the judiciary under our system of government.

> *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 327.
> *Eisner* v. *Macomber,* 252 U.S. 189.

Congress, it is true, not infrequently includes in a statute a clause setting forth its interpretation of a constitutional limitation affecting the scope of the statute. Such a practice often serves the convenience of both the government and the governed by including the whole body of the controlling law on the point in one express enactment, but it cannot affect the power and duty of the courts to apply the statute in conformity with the fundamental law.

Just as the courts will construe a statute which contains no such interpretive clause (for instance, the 1918 Revenue Act) to be nevertheless subject to the necessarily implied exceptions imposed by a constitutional limitation (see 31 Ops. Atty.-Gen. 441, in which it was ruled that, even under the 1918 statute, the compensation of state officers and employees could not be taxed), so also will the courts seek to construe a statute which does contain such an interpretive clause so as to make it recognize the substance and extent of the constitutional limitation affecting its scope. That constitutional limitation of power prescribes that line with which the interpretive clause must coincide so far as it does. It is merely surplusage in the statute when it correctly interprets the whole or some part of the constitutional limitation; when it fails so to interpret, it fails of the only purpose which could justify its use, and becomes impertinent and wholly nugatory. An insufficient definition certainly cannot narrow the constitutional limitation which it purports to declare.

The clauses of the 1917 Revenue Act which exempt the compensation of officers and employees of states and subdivisions thereof are clearly interpretive clauses rather than the grant of exemptions as a matter of grace, and indeed have been asserted and demonstrated by the Treasury Department to be interpretive clauses (see Sol. Op. No. 122, and *Warwick* v. *Bettman*, 102 Fed. 127). They are an attempt by Congress to express the limitations upon federal power which the Constitution imposed, as found by the court in the cases first above cited.

So far as the statutory exemption coincides with the constitutional limitation it is merely declaratory; if it does not go as far as the Constitution, it may be disregarded; it is only when it grants an exemption which the United States is not forced to recognize that it has any substantive effect.

II.

The compensation of such instrumentalities as the states may select to exercise their governmental powers cannot be taxed by the United States.

(1) IT IS NOT WITHIN THE CONSTITUTIONAL POWER OF CONGRESS TO TAX THE INSTRUMENTALITIES BY WHICH STATES OR POLITICAL SUBDIVISIONS THEREOF EXERCISE THEIR GOVERNMENTAL FUNCTIONS.

The constitutional rule and the reasons upon which it rests are shown by the following quotations from the case of *Collector* v. *Day*, 11 Wall. 113, at pages 122 to 124:

> "In *Dobbins* v. *The Commissioners of Erie County*, it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of

the government, which could not be interfered with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

"The cases of *McCulloch* v. *Maryland,* and *Weston* v. *Charleston,* were referred to as settling the principle that governed the case, namely, 'that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers.'

"The soundness of this principle is happily illustrated by the Chief Justice in *McCulloch* v. *Maryland,* 'If the States,' he observes, 'may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government.' 'This', he observes, 'was not intended by the American people. They did not design to make their government dependent on the States'. Again, 'That the power of taxing it (the bank) by the States may be exercised so far as to destroy it, is too obvious to be denied.' And, in *Weston* v. *The City of Charleston,* he observes: 'If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it which the will of each State and corporation may prescribe.'

"It is conceded in the case of *McCulloch* v. *Maryland,* that the power of taxation by the States was not

> abridged by the grant of a similar power to the government of the Union; that it was retained by the States, and that the power is to be concurrently exercised by the two governments; and also that there is no express constitutional prohibition upon the States against taxing the means or instrumentalities of the general government. But, it was held, and, we agree properly held, to be prohibited by necessary implication; otherwise, the States might impose taxation to an extent that would impair, if not wholly defeat, the operation of the Federal authorities when acting in their appropriate sphere.
>
> "These views, we think, abundantly establish the soundness of the decision of the case of *Dobbins* v. *The Commissioners of Erie,* which determined that the States were prohibited upon a proper construction of the Constitution, from taxing the salary or emoluments of an officer of the government of the United States. And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a State."

A further statement and application of the same rule is set forth in the case of *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U.S. 429, at pages 585 and 586, from which we quote as follows:

> "But we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason is given by Chief Justice Marshall in *Weston* v. *Charleston,* 2 Pet. 449, 468, where he said: 'The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract.

> The extent of this influence, depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operation of government. It may be carried to an extent which shall arrest them entirely. . . . The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.' Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution."

There are a number of other cases in which the same point has been discussed or decided. Thus in *Veazie Bank* v. *Fenno*, 8 Wall. 533, the court said (at page 547):

> "It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing powers of Congress."

In *United States* v. *Baltimore &c. R.R. Co.*, 17 Wall. 322, it was held that a municipal corporation established by the laws of a state could not be constitutionally taxed by Congress with respect to its municipal revenues. The court said (on page 327):

> "The right of the States to administer their own affairs through their legislative, executive and judicial departments, in their own manner through their own agencies is conceded by the uniform decisions of this

court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal government."

In *South Carolina* v. *United States*, 199 U.S. 437, the court, in applying the earlier decisions, says, at page 461:

> ". . . that the thought has been that the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the state in the carrying on of an ordinary private business."

In *Van Brocklin* v. *Tennessee*, 117 U.S. 151, the court (at page 178) expressly approved the two last-cited cases, and also (at page 162) a decision of the Supreme Court of Illinois in which that court denied the power of the United States to tax the states, their agents or property.

In *Logan County* v. *United States*, 169 U.S. 155, it was held that a federal tax assessed to a railroad as the agent of its shareholders and deducted from dividends paid by the railroad to the shareholders was invalid as against a county holding stock in the railroad, since such a tax is in effect upon the revenues of the county.

In *Ambrosini* v. *United States*, 187 U.S. 1, it was held that surety bonds given to a state in accordance with a state statute by persons to whom dram-shop licenses were granted were not subject to the federal stamp tax.

In *Flint* v. *Stone Tracy Co.*, 220 U.S. 108, the court said (at page 157):

> "The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the governmental operations of the states. The exercise of such rights as the establishment of

> the judiciary, the employment of officials to administer and execute the laws, and similar governmental functions cannot be taxed by the Federal government."

In *Farmers' & Mechanics' Savings Bank* v. *Minnesota,* 232 U.S. 516, the court said, in holding that bonds of municipalities of Indian Territory and Oklahoma Territory were exempt from taxation by a state, as instrumentalities of the United States:

> "By like reasoning it has come to be recognized that bonds issued by the states are not taxable by the Federal Government, and it is upon this ground that this court held, in *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U.S. 429, 584, that the income tax provisions of the Act of August 14, 1894 were unconstitutional in that they imposed a tax upon the income derived from municipal bonds issued under the authority of the states."

In *Evans* v. *Gore,* 253 U.S. 245, the court said, at page 255:

> "True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize and sustain is well settled. In *Collector* v. *Day,* 11 Wall. 113, it was held that Congress could not impose an income tax with respect to the salary of a judge of a state court; in *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U.S. 429, 585, 601, 652, 653 it was held—the full court agreeing on this point—that Congress was without power to impose such a tax with respect of interest received from bonds issued by a state or any of its counties or municipalities; and in *United States* v. *Railroad Co.,* 17 Wall. 322 there was a like holding as to municipal revenues derived by the city of Balti-

> more from ownership of stock in a railroad company. None of these decisions was put upon any express prohibition in the Constitution, for there is none; but all recognized and gave effect to a prohibition implied from the independence of the States within their own spheres.''

Other cases in the federal courts in which the same principle was enunciated include *Freedman* v. *Sigel,* 10 Blatchf. 327; Fed. Cas. 5080, in which it was held that the United States cannot tax the salary of a judge of a state court of limited jurisdiction, although the salary of the judge was not established by statute, but was determined by the Board of Supervisors of the county; *United States* v. *Owens,* 100 Fed. 70, in which it was held that a bond given by a dram-shop keeper as a condition precedent to the issue of a liquor license cannot be subjected to a stamp tax by the United States, since the bond is an incident of the license, which is a state instrumentality; and *Bettman* v. *Warwick,* 108 Fed. 46, decided by the Circuit Court of Appeals of the Sixth Circuit, affirming 102 Fed. 127, and holding that a notary public appointed by a state cannot be required to pay a stamp tax to the United States on his official bond.

It is an inescapable conclusion from the above decisions that the determination by the court that the amount involved in each case was not subject to taxation by the United States was merely the conclusion reached from the syllogism in which the major premise was that, under the Constitution, the one government could not interfere by taxation or otherwise with the means employed in the proper exercise of the governmental functions of the other, and the minor premise that the particular agency under consideration was a means so employed, to which means (in the case of the taxes on income above cited) was inseparably connected the compensation incident to the employment.

(2) THE LACK OF POWER OF THE UNITED STATES TO TAX THE INSTRUMENTALITIES BY WHICH THE STATES EXERCISE THEIR GOVERNMENTAL FUNCTIONS EXTENDS TO ALL APPROPRIATE INSTRUMENTALITIES WHICH THE STATES MAY SELECT FOR THE PURPOSE, AND NOT MERELY TO THOSE WHICH THE UNITED STATES MAY DESIGNATE.

It appears to be the contention of the United States, through its Treasury Department and the counsel who tried this case for the government in the District Court, that the lack of power of the United States to tax the instrumentalities of the states does not extend to all appropriate instrumentalities which the state may select to exercise its governmental functions, but merely to those which Congress may designate as exempt in the particular Revenue Act under consideration—in the 1916 and 1917 Revenue Acts "interest upon the obligations of a State or any political subdivision thereof" and "the compensation of all officers and employees of a State, or any political subdivision thereof," or, as expressed in the portion of the 1917 Revenue Act applicable to the excess profits tax, "in the case of officers and employees under . . . any State . . . or any local sub-division thereof, the compensation or fees received by them as such officers and employees."

The contention of the Commissioner of Internal Revenue that the salaries of regular and permanent officers and employees of states and political subdivisions of states are exempt from federal taxation, but that compensation of all other human instrumentalities by which a state or one of its political subdivisions undertakes to exercise its governmental functions is subject to federal taxation, is based upon an opinion of the Solicitor of Internal Revenue known as Sol. Op. 122 and reported in Cum. Bull. Dec. 1921, p. 107.

Construed and enforced by the Treasury Department, as appears by the above-mentioned opinion, in order to be an officer or employee whose compensation is not subject to federal taxation—

> "it must appear that the duties performed by such person are of a continuous nature, and are not occasional, temporary or specific in character or object."

In this opinion the Solicitor of Internal Revenue, without considering the underlying constitutional question at all, and relying wholly upon previous administrative interpretation, assumes without argument that only the compensation of officers and employees is exempt from federal taxation, and then proceeds with an exhaustive and scholarly exposition of the law to define "officers" and "employees," within the meaning of the rule thus created, as only those who are in regular and continuous service. But this opinion demonstrates its own unsoundness when applied to the facts with respect to which the opinion was rendered, for the Solicitor does not hesitate to carry his rule to its logical conclusion, and holds that a Commissioner appointed by a state court to exercise a purely judicial function, in the same manner as an auditor or master, is taxable on the compensation which he receives from the state, because he exercises the judicial function over a particular case only, and is thus not in the regular and continuous service of the state within the meaning of the rule which the Solicitor has himself created.

It would be hard to find a more typical example of purely governmental service than the exercise of the judicial function, and yet for some reason, the underlying basis of which neither the Solicitor nor any one else has ever attempted to explain, we are told that an auditor, commissioner, or master, and presumably a juror, is taxable by the United States on the compensation which he receives from the state or county merely because his services are not continuous, while the compensation paid to one who performs a far less clearly governmental service, but whose services are continuous, is exempt.

It should be remembered before this rule is finally adopted that the right of the federal government to tax the instrumentalities of the state stands on no higher basis than the right of the states to tax the instrumentalities of the federal government, and if Solicitor's Opinion 122, and the contention of the government in the present case are sound, the compensation of persons appointed by the President to represent the United States in the negotiation of particular treaties, or to perform particular missions in the settlement of international difficulties, as well as of commissioners, masters, and auditors appointed by the federal courts, is subject to taxation in the state of which the person who receives the compensation is a resident.

There is no judicial precedent for the limitation of the exemption which the Commissioner has sought to establish, and it is believed by all who have given the subject serious consideration to be entirely unsound (see XXXVIII Harvard Law Review, 793). The origin of this limitation can probably be traced to the circumstance that, in former years, governmental functions were usually exercised by "regular and permanent" officers and employees of states, counties, cities, towns, and villages. Their tenure might for political reasons be extremely precarious, their compensation might be entirely derived from fees paid by private citizens, and their duties might be so insignificant that most of their time was devoted to other and entirely unrelated occupations; but nevertheless the compensation received by them for their public services was recognized as beyond the power of the federal government to tax. In the nature of things the cases upon this point which came before the courts in those years were the cases of the foregoing type of means or instrumentality employed by the states and political subdivisions thereof to carry on their governmental functions.

Under the more complex social and economic conditions of more recent times, states and political subdivisions of states have found it necessary to employ more efficient means and instrumentalities to carry on their governmental functions, and, instead of untrained appointees of uncertain tenure, who use their official emoluments to eke out a living derived mainly from farming or from some mechanical trade, recognized experts in the engineering, medical, or legal professions are sometimes employed, and if their full time is not required by one state or municipality, they are at liberty to, and do, devote their remaining time to like service for other states and municipalities or for private individuals and corporations; but they are none the less means and instrumentalities of states and political subdivisions of states because they devote their remaining time to similar rather than to dissimilar labor.

The Commissioner of Internal Revenue in his not reprehensible zeal to enhance the public income, has attempted to limit the effect of such cases as *Collector* v. *Day,* 11 Wall. 113, which were decided on a broad, general principle, to the particular state of facts which happened to be before the court in the case; but constitutional principles are sufficiently elastic to adjust themselves to changing economic conditions, and just as the court will apply the constitutional provisions as to interstate commerce, adopted at a time when even steam railroads were unheard of, to such modern developments as motor busses operating between cities in different states (*Buck* v. *Kuykendall,* 267 U.S. 307), so will the constitutional exemption of the means and instrumentalities of states from federal taxation extend to such human means and instrumentalities as modern social and economic conditions may render it necessary for states and their political subdivisions to employ.

So far as counsel are aware, no argument with even a colorable foundation in logic has been advanced to support a distinction between permanent and regular officers and employees of states and political subdivisions thereof on the one hand and all other human instrumentalities of such bodies politic on the other; and the distinction, if it exists at all, must rest on the assumption that Congress has limited the exemption of the compensation of instrumentalities of states from federal taxation to a certain class which it has arbitrarily selected.

There is nothing in the decisions of the courts which justifies this limitation of the exemption to such instrumentalities of the states as may be arbitrarily selected by Congress. On the contrary, it was expressly said by the court in *United States* v. *Baltimore &c. R.R. Co.,* 17 Wall. 322:

> "The right of the States to administer their own affairs through their legislative, executive and judicial departments, *in their own manner through their own agencies* is conceded by the uniform decisions of the courts. . . . This carries with it an exemption of those agencies and instruments from the taxing power of the Federal government."

In *Freedman* v. *Sigel,* 10 Blatchf. 327; Fed. Cas. 5080, the court said:

> "The line which marks and limits the constitutional power of each [the United States and the state] remains the same, unvaried by the incidental manner in which each or either may choose to exercise its acknowledged and unquestioned authority."

In *Bettman* v. *Warwick,* 108 Fed. 46, the court said, in holding that the bond of a notary public could not be subjected to the federal stamp tax:

> "That his services are compensated by fees and not by a salary is of no importance. Many more important officials of the state are paid by fees. It is for the government which appoints him to determine how he shall be paid, and he is no less a government official because paid by fees for services rendered than if paid a stipulated salary out of the treasury of the state.
>
> "The test as to whether a notary is engaged in the exercise of the governmental powers of the state does not depend upon how his compensation is provided. That is a matter for legislative regulation and in no wise affects the nature of the powers of the official who is so compensated."

The exemption of the instrumentalities of the United States from taxation by the several states and the exemption of the instrumentalities of the states from taxation by the United States rest upon precisely the same foundation. In neither case is any express limitation found in the Constitution; in both cases such a limitation is necessarily implied from the relation of the states to the federal government. Both limitations are of equal importance, and neither is entitled to a broader application than the other. As was said by the court in *Texas* v. *White,* 7 Wall. 700:

> "Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the National Government."

In *Hammer* v. *Dagenhart,* 247 U.S. 251, the court said (at page 275):

> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the federal power in all matters entrusted to the nation by the Federal Constitution."

The taxing statutes of many of the states contain specific exemptions of federal instrumentalities; but these provisions are merely a guide to the taxing officials, and do not and cannot limit the general constitutional exemption which exists regardless of the statute. *Biscoe* v. *Tax Commissioner,* 236 Mass. 201. For example, the tax laws of Massachusetts, so far as federal instrumentalities are concerned, exempt only the "property of the United States" from the general property tax (General Laws of Massachusetts, c. 59, sec. 5, cl. 1), and the interest on "bonds, notes and certificates of indebtedness of the United States" and "the wages and salaries of employees and officers of the United States government" from the income tax (General Laws of Massachusetts, c. 62, sec. 1 (*a*), cl. 2; sec. 5 (*b*)), and other states have similar provisions; but the courts of these states and of the United States have held all sorts of federal instrumentalities to be exempt from state taxation, and have not limited the exemption to interest on obligations of the United States government and the salaries of permanent officers and employees.

Beginning with the classic case of *McCulloch* v. *Maryland,* 4 Wheat. 316, in which it was held that a state could not tax the operations of the Bank of the United States, it has been consistently held in a series of cases that a state could not tax the instrumentalities of the United States, whatever their character. Thus it has been held in *Van Allen* v. *The Assessors,* 3 Wall. 573, and in many other subsequent cases, that national banks, though private corporations operated for profit, are instrumentalities of the United States, and cannot be taxed by the states except so far as Congress has permitted; in *Farmers' &c. Savings Bank* v. *Minnesota,* 232 U.S. 516, that a state could not tax the bonds of a territorial government or of any of its constituent municipalities; in *Smith* v. *Kansas City Title & Trust Co.,* 255 U.S. 180, that a state could not tax the bonds of a federal land bank; and in *Federal Land Bank* v. *Crosland,* 261 U.S. 374, that a federal land bank could not be required by a state to pay a tax as a condition precedent to recording a mortgage.

So also a tax on persons passing through a state cannot be imposed on officers of the United States in the performance of their duties (*Crandall* v. *Nevada,* 6 Wall. 40), and a tax on persons engaged in sending telegraph messages which makes no exemption in favor of official messages of the United States government is unconstitutional. *Williams* v. *Talladega,* 226 U.S. 404. A state cannot tax the franchise of a transcontinental railroad company chartered by Congress. *California* v. *Central Pacific R.R. Co.,* 127 U.S. 1. Lands in possession of an Indian tribe are not subject to taxation by a state, for the reason that such taxation would be upon an instrumentality employed by the United States for the benefit and control of a dependent race (*New York Indians,* 5 Wall. 761; *Choate* v. *Trapp,* 224 U.S. 665); and in *Gillespie* v. *Oklahoma,* 257 U.S. 501, it was clearly held that a state could not tax the income derived by a lessee from leases of Indian lands.

It has been unequivocally decided in several cases that, just as the United States is free to select such instrumentalities as it sees fit to execute its governmental functions without dictation by the states, the state is free to select any instrumentality it may choose to execute its governmental functions without dictation from the United States.

In *McCulloch* v. *Maryland,* 4 Wheat. 316, at 409, the court says:

> "The government which has the right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

In *South Carolina* v. *United States,* 199 U.S. 437, at page 454, it is laid down that the "mode" by which the states may exercise their powers "is left to their discretion and is not subject to National supervision." In *Railroad Co.* v. *Peniston,* 18 Wall. 5, at page 36, the court says:

> ". . . that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax."

In *Osborn* v. *United States Bank,* 9 Wheat. 738, it is said in this connection, at page 862:

> "If an individual (*instead of a bank incorporated by Congress*) were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties."

In *McCulloch* v. *Maryland,* 4 Wheat. 316, at page 432, it is said:

> "If the States may tax one instrument employed by the government, they may tax any and every other instrument."

The foregoing authorities indisputably establish the proposition that any appropriate instrumentality employed by the state in the exercise of its governmental functions is beyond the federal taxing power, and thus destroy the foundation of the distinction between "officers and employees'' and other agencies as asserted by the government in this case and erroneously given controlling weight by the trial court in its decision.

(*a*) *In addition to officers and employees, independent contractors have been definitely recognized as such appropriate instrumentalities.*

The contention appears to be made in the present case that independent contractors cannot in any event be instrumentalities of government exempt from taxation by the other sovereignty. But the cases are otherwise.

In the early case of *Osborn* v. *United States Bank*, 9 Wheat. 738, at page 866, the court said:

> ''Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.''

And again, in *Pembina Mining Co.* v. *Pennsylvania*, 125 U.S. 181, at page 186, the court says:

> ''If Congress should employ a corporation of shipbuilders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union; and we may add, without the permission and against the prohibition of the State.''

So also the case of *Choctaw & Gulf R.R. Co.* v. *Harrison*, 235 U.S. 292, declares that a lessee of Indian coal-lands operating under a lease thereof from the federal government obligating the lessee to remove specified amounts of coal annually and pay a certain royalty therefor was, in so doing, an instrumentality of the federal government in the performance of its governmental obligations under an Indian treaty, and that as such agency the lessee could not be subjected to an occupation or privilege tax by a state. We submit that a more perfect example than the above of an independent contractor employed as an instrumentality of government would be hard to find. The court applied the doctrine of *McCulloch* v. *Maryland* to this independent contractor, and held in effect that its compensation (net profits from operation under the contract) could not lawfully be reduced by state taxation of such compensation.

To similar effect see also *Indian &c. Oil Co.* v. *Oklahoma*, 240 U.S. 522, and *Gillespie* v. *Oklahoma*, 257 U.S. 501.

In *Western Union Tel. Co.* v. *Texas*, 105 U.S. 460, it appeared that the State of Texas laid a tax on all telegraph messages transmitted in Texas. The federal government, under a contractual arrangement, used the plaintiff to transmit messages for it. The court said (on page 466):

> "As to the government messages, it is a tax by the state on the means employed by the government of the United States to execute its constitutional powers, and therefore, void."

Williams v. *Talladega*, 226 U.S. 404, is to the same effect upon the same state of facts.

It will be noted that these two cases both recognize a typical independent contractor as a governmental instrumentality.

It is thus clear that, whether the plaintiffs were officers, employees, or independent contractors, they were in any event not disqualified from acting as instrumentalities of government by reason of the method adopted by the various states and municipalities in acquiring their services, whether by election, appointment, or contract. The essential fact as to this phase of the matter is that their services were acquired by a method and in a capacity satisfactory to the sovereignty which acquired them.

Counsel for the defendant may inquire where we are to draw the line, and may point out that the plaintiffs' argument leads to the conclusion that, if the plaintiffs' income is exempt from federal taxation, contractors who erect public works for states and cities, and manufacturers and dealers who sell goods to states and cities, must be equally exempt from federal taxation on the profits derived from such transactions. It is hard to see why this is not so, and indeed no case holds otherwise. If a county is to erect a new court-house, how is it any greater interference with the exercise of its governmental functions to tax the interest on the bonds issued to pay for the court-house, in the hands of the individual bondholders, than to tax the profits of the contractor who erects the building? In either case the tax will be paid by the county, in the one case in the form of higher interest on the bonds, in the other by a higher price paid the contractor for his work.

The cases previously cited which limit the power of the states to tax federal instrumentalities draw no distinction between income from personal services on the one hand and income from property or from the use of capital on the other; both alike are exempt. If the states and the United States are to be treated with equality with respect to this exemption implied from their relations under the Constitution, as this court has repeatedly said should be done, no distinction can be drawn between income derived from personal service to a state and income derived from a contract with a state involving the use of capital, the purchase of material and the employment of the labor of others. Both classes of income are exempt, provided the services or the contract relates to the governmental rather than to the proprietary functions of the state.

The present case does not, however, require a decision that income from any source other than from personal services to a state or political subdivision thereof is exempt from federal taxation. There is an underlying distinction between income received as compensation for the personal services of the taxpayer and income derived from property or from the use of capital. All of the income-tax acts have treated income from salaries, wages, and personal services as distinguishable from other income by enumerating the different classes of income separately. Many of such acts establish a practical distinction between the two classes of income, as notably in the statutes providing for special methods of taxing "personal service corporations," and those taxing "earned income" at a lower rate than income of other types.

A tax on salaries, wages, and other compensation for personal service is in substance and effect a tax on gross receipts. The deductions allowed from gross income of this character are in practice negligible. The tax on the income of a contractor or dealer is in substance as well as in name a tax on net income, the deductions usually amounting to from 80 per cent to 90 per cent of the gross receipts. It may be that here the distinction lies. As was said by the court in *United States Glue Co.* v. *Oak Creek,* 247 U.S. 321, at page 328:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."

But whatever may be the basis of the distinction, if there is a distinction, between income derived from personal services and income derived from the use of capital, there is no sound basis for any distinction between income from personal services resulting from an official appointment and income from personal services resulting from a contractual employment, and still less is there any basis for a distinction between "regular and permanent" officers and employees, and those whose services are acquired, whether by appointment or by contract, to perform a specific task.*

It is plain that the Commissioner of Internal Revenue has been barking up the wrong tree; that the test of the exemption of compensation received from states and political subdivisions of states from federal taxation is not whether or not the person receiving the compensation is a regular and permanent officer or employee, but whether or not he is a means or instrumentality employed to assist in carrying out a governmental, as distinguished from a proprietary, function.

(3) THE COMPENSATION OF SUCH INSTRUMENTALITIES IS INSEPARABLY CONNECTED WITH THE INSTRUMENTALITIES, AND THEREFORE SUCH COMPENSATION CANNOT BE TAXED BY THE UNITED STATES.

Many economists contend that an income tax is not a direct tax on the specific items which make up a taxpayer's income, but is a personal tax on the taxpayer, graded in proportion to his ability to pay. Such ability may, it is said, be properly measured by any rational test; and of the rational tests which suggest themselves, the taxpayer's net income during the preceding year is, it is generally considered, the most logical and satisfactory. If this conception of the nature of the income tax is sound, it can make no difference whether the taxpayer was within the jurisdiction of the state which imposed the tax when he received the income, or whether the source of the income was such as to be beyond the power of the state to tax, for the income is merely the measure, and not the subject, of the tax, and the salaries of state officers and interest on municipal bonds are subject to the federal income tax; and, conversely, the salaries of federal officers, interest on United States bonds, and dividends of national banks are subject to state income taxes in the state where the recipient of the income lives.

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* That the Commissioner of Internal Revenue has already perceived the unsoundness of his previous rulings is indicated by his recent decision, known as I.T. 2214, published in Internal Revenue Bulletin IV-42-2402, to the effect that a receiver appointed by a state Bank Commissioner to wind up a particular insolvent state bank is not taxable by the United States on his compensation as receiver.

While this conception has much to commend it, both from a practical and from a legal standpoint, it is so wholly inconsistent with the judicial conception of the nature of an income tax that it can have no standing in any legal argument. In many of the cases cited elsewhere in this brief it has been assumed without argument that a tax on an individual measured by his income is a tax on the different sources of which his income is composed, and if any of those sources is exempt, the portion of his income assignable to that source is equally exempt. In some of the decisions, however, the point has been expressly discussed. Thus the court in *Collector* v. *Day*, 11 Wall. 113, at page 122, quotes with approval the opinion in *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, as follows:

> ". . . that the salary or compensation for the services of the officer were inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt."

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429; 158 U.S. 601, it was expressly held that a general federal income tax which included income from property was a direct tax on such property, and could not be imposed by Congress unless apportioned among the states in proportion to population, and that interest derived from state and municipal bonds could not be taxed by the United States at all.

In *Lynch* v. *Turrish,* 247 U.S. 221, it was held that a taxpayer, in 1915, could not be assessed for a tax on income received by him prior to March 1, 1913, when the Sixteenth Amendment went into effect.

In *Evans* v. *Gore,* 253 U.S. 245, it was held that the salary of a federal judge appointed prior to the enactment of the Income Tax Act was not subject to the tax, on account of the constitutional provision prohibiting the diminution of the salary of judges, the court saying:

> "If the compensation be the only income, the tax falls on it alone; and, if there be other income, the inclusion of the income augments the tax accordingly. In either event the compensation suffers a diminution to the extent that it is taxed."

In *Miles* v. *Graham* (decided June 1, 1925) the Supreme Court of the United States held that the salary of a United States judge is not to be considered as gross income under any Federal Revenue Act, though his appointment be subsequent to the passage of the act, the court saying:

> "From the 'gross income' various deductions and credits are allowed, as for interest paid, contributions or gifts made, personal exemptions varying with family relations, etc., and upon the net result assessment is made. The plain purpose was to require all judges to return their compensation as an item of 'gross income' and to tax this as other salaries. This is forbidden by the Constitution."

The principle that income from a forbidden source cannot be taxed even if it is merged in a general tax on income, enunciated with particular reference to the salary of an officer, has been applied to all forms of compensation of all varieties of appropriate instrumentalities in the cases cited elsewhere in this brief, including its application to the compensation of an independent contractor in the form of net profits from operation under his contract. See also—

Western Union Telegraph Co. v. *Texas,* 105 U.S. 460.
Choctaw &c. R.R. Co. v. *Harrison,* 235 U.S. 292.
Indian &c. Oil Co. v. *Oklahoma,* 240 U.S. 522.

The state income tax of Massachusetts was enacted on the theory that it was a personal tax measured by ability to pay, and liability to the tax was made to depend upon the taxpayer's domicile during the year in which the tax was assessed, and not during the year in which the income was received. General Laws of Massachusetts, c. 62, sec. 25. It was held, however, in *Hart* v. *Tax Commissioner,* 240 Mass. 37, that an income tax is not a personal tax, but is a direct tax on the source of the income, and unless the subject-matter of the tax was within the jurisdiction of the commonwealth, the income could not be taxed. Consequently it was held that one who had become a resident of the commonwealth could not be constitutionally taxed with respect to his income of the preceding year, when he had lived in another state.

These decisions demonstrate that the economists' conception of an income tax has no standing in law, and that the courts will differentiate between the different items of a taxpayer's income and will protect him from taxation with respect to those items which come from a source which lies beyond the jurisdiction of the legislative body levying the tax.

It may be well at this point to advert to the erroneous conception of the law by the District Court in the present case which appears to be the foundation of its decision. The court says:

> "I am of the opinion that the taxing of the income of private persons, although arising from services rendered to a state, does not so seriously interfere with the governmental functions of the state as to be unconstitutional."

The court was evidently misled by the analogy of the taxation of interstate commerce, in which the validity of the tax depends on the degree of interference; whereas in the case of the taxation of federal instrumentalities by states, or of state instrumentalities by the federal government, the principle that "the power to tax is the power to destroy" is strictly applied, and the exemption is absolute, regardless of the degree of interference.

This distinction is well pointed out by Holmes, J., in *Gillespie* v. *Oklahoma,* 257 U.S. 501, at page 525, in the following language:

> "The criterion of interference by the States with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the States are to exist and make laws. The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance. 'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.' 240 U. S. 530. The step from this to the invalidity of the tax upon income from the leases is not long.
>
> "In cases where the principal is absolutely immune from interference an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source the tax is *pro tanto* void."

Applying this decision to the taxation by the United States of instrumentalities of the states, as it undoubtedly must be, it disposes of any argument based on the degree of interference with the proper activities of the state.

III.

The plaintiffs were instrumentalities by which the state exercised its strictly governmental functions.

The question remains to be determined what constitute governmental functions of a state as distinguished from those which are private and proprietary, and on which side of the line the functions fall in respect to which the plaintiffs acted as means or instrumentalities of the states and political subdivisions thereof.

The line between governmental and proprietary functions has been drawn for many different purposes, and as an original question it might well be contended that, as respects taxation by another sovereignty, any function commonly recognized as appropriate for a state to undertake was governmental; that the circumstances that private parties formerly undertook the same enterprise and that it was financed by payments made for services rendered would not be sufficient to justify federal taxation any more than such circumstances justified taxation by the states of the United States Bank or would now justify taxation of the operations of the post-office.

While purely private enterprises, if carried on by a state government which had adopted to a greater or less degree a socialistic program, would doubtless not be exempt from federal taxation, undertakings sufficiently public to justify the exercise of the power of taxation and the power of eminent domain in their behalf should be deemed sufficiently governmental to enjoy immunity from federal taxation. It appears, however, that the authorities support a somewhat narrower rule.

This court, in the case of *South Carolina* v. *United States,* 199 U.S. 437, previously cited and quoted, encountered and determined the question where the dividing line must be drawn between the imperative requirements of freedom of the taxing power of the federal government and the equally imperative requirements of freedom of the state governments to conduct their own affairs. The court says, on page 456:

> "There is something of a conflict between the full power of the nation in respect to taxation and the exemption of the State from Federal taxation in respect to its property. Where and how shall the line between them be drawn?"

The court, after a review of the authorities treating of tax exemption and of the tort liability of municipalities, then goes on to say, on page 463:

> "Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while *the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions,* yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation."

The court, on pages 461 and 462 of the same case, cites and quotes several cases from the state courts showing the bases of the "clear distinction as respects responsibility for negligence," which distinction it adopts, in the quotation last above made, as the line of limitation on the federal power to tax state activities. We adopt, as typical, one of the court's quotations, on page 462, from the case of *Lloyd* v. *Mayor &c. of New York,* 5 N.Y. 369, 374, as follows:

> "The corporation of the city of New York possesses two kinds of powers, one governmental and public, and, to the extent they are held and exercised, is clothed with sovereignty—the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, it is corporate, legal individual."

This court in *Flint* v. *Stone Tracy Co.,* 220 U.S. 108, at page 172, cites *United States* v. *South Carolina, supra,* and reaffirms its above-quoted doctrine in the following language:

> "The true distinction is between the attempted taxation of those operations of the state essential to the execution of its governmental functions, and which the state can only do itself, and those activities which are of a private character. The former the United States cannot interfere with by taxing the agencies of the state in carrying out its purposes."

The plaintiffs must therefore accept as the test of the governmental character of the activities in which they were engaged the same test as would be used to determine whether there would be any liability upon a municipal corporation for negligence in connection with such activities, and it is consequently now only necessary to measure the various activities of the plaintiffs in this case against the standard or distinction thus decisively established in order to determine whether the compensation from such activities is taxable or not.

(1) THE DETERMINATION BY A STATE OR POLITICAL SUBDIVISION THEREOF OF THE PLAN OF A PUBLIC WORK IS AN EXERCISE OF ITS LEGISLATIVE POWER, AND ONE OF THE PUREST OF ITS STRICTLY GOVERNMENTAL FUNCTIONS.

Judge Dillon in his work on "Municipal Corporations," which work appears, from the frequency of its citation in cases bearing on the phase of the question of municipal tort liability which depends on the distinction between governmental and proprietary functions, to enjoy the great respect of the courts, says in volume IV (5th ed.), sec. 1626, p. 2838:

> "A municipal corporation is not impliedly liable to an action for damages either for the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character. Thus where a corporation has under its charter a discretion as to the time and manner or plan of making public or corporate improvements, as for example, grading streets, constructing sewers, drains, vaults and the like, neither mandamus nor a private action will lie against the corporation for omitting or neglecting to act, and the reason is that such powers are conferred to be exercised or not as the public interest is deemed to require, and there is no implied liability for deciding either that the public interest does not require action, or that it requires action in a particular way."

From the decisions of the courts which support this proposition the following quotations are pertinent:

> "Legislative power vested in a city is governmental

> and discretionary." *Burford* v. *Grand Rapids,* 53 Mich. 98.
>
> "The determination of the plan of a public work is in the nature of legislative action, the lawful exercise of which can neither be a wrong, nor be transferred to courts and juries from the body to which it belongs." *Lansing* v. *Toolan,* 37 Mich. 152.
>
> "The extent to which it may be proper for a municipal corporation to exercise the powers vested in it, as well as the mode of their exercise within the limits of the law creating them, is of necessity entrusted to the judgment, discretion and will of the properly constituted authorities to which they are delegated." *Brinkmeyer* v. *Evansville,* 29 Ind. 187.
>
> "The duties of the aldermen in determining what drains should be built, and where they should discharge, were of a quasi judicial nature, involving the exercise of a large discretion, and depending upon considerations affecting the public health and convenience. They were required to act, not as agents of the city, or in any manner under the direction of the city, but as public officers." *Child* v. *Boston,* 4 Allen, 51.

This court itself has accepted the rule set forth in the above cases as applied to sewerage and drainage matters, citing *Child* v. *Boston, supra,* and *Mills* v. *Brooklyn,* 32 N.Y. 489, 495-500, as the leading authorities. It says in *Johnson* v. *District of Columbia,* 118 U.S. 19, 20:

> "The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of a deliberate judgment and large dis-

> cretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land."

The same rule has also been stated and applied many times by the state courts with reference to the exercise of the legislative function in connection with activities of municipalities, which in some aspects are deemed proprietary, including the establishment of waterworks and the maintenance of streets. We submit the following quotations from typical cases:

> "A city, in determining what part of a street it will improve and grade, acts in its delegated governmental capacity, and is not answerable to an individual for a neglect of duty in determining such a question." *Ely* v. *St. Louis*, 181 Mo. 723.

> "The adoption of a plan for supplying a city or a given section of it with water involves the exercise of a delegated governmental power; and an error of judgment with respect to the efficiency and adequacy of such system is not in the first instance reviewable by the courts." *Stansbury* v. *Richmond*, 116 Va. 205, at 207.

> "That in the absence of a statute governing the case, a city is not chargeable with damages because of its failures or mistakes in the exercise of its purely governmental functions, may be admitted. It may also be admitted that a city's *power to order or provide for* the establishment, construction and maintenance of public waterworks, public sewers, street paving, and other schemes of public improvements is

> governmental, and for its failure to act in the initiation of such an undertaking it is not answerable to the suit of any person. The principle is so well settled and well known that we need not pause to cite or discuss the authorities. But it is no less well settled that municipal functions are not all governmental or legislative, but that in very many respects cities and towns act ministerially, and that in the discharge of such duties they are responsible within certain limits for the manner and method of the performance. The line of demarcation between their powers may sometimes be a narrow one, but it is not ordinarily indistinct." *Hines* v. *City of Nevada,* 150 Iowa, 620, 623, and 624.

There are innumerable other cases from the state courts in addition to those here quoted and those cited by this court in *South Carolina* v. *United States, supra,* and *Johnson* v. *District of Columbia, supra,* which, as stated on page 21 of the latter case, "generally, if not uniformly, support these propositions." It seems superfluous to cite any more of them, since those already referred to must be considered as firmly establishing the rule that legislative activities of a city in connection with its public works are governmental, and that the choice of a plan for such a public work is legislative.

(*a*) *The means chosen by a state or political subdivision thereof to advise or inform it on the problems involved in the choice of such plan is a means used in the exercise of such legislative power. Regardless of whether or not the subject of the problem on which the legislative function is acting is itself of such a nature that any activities therein would be strictly governmental, the legislative determination of the problem is nevertheless purely governmental.*

The first proposition stated in the heading immediately above seems axiomatic. It must be an unavoidable conclusion that *any directly utilized agency which contributes substantially toward the effectiveness of the use of a power or function must be a means used in the exercise of such power or function.* The fact that it does contribute substantially to such effectiveness is a convincing proof that it was so used. The use of expert advice and knowledge in any specialized field of activity is universally recognized as essential. Recognition of the essentiality of expert guidance for legislative activities such as are under discussion here has been expressly given by the courts. In the case of *Waters* v. *Omaha,* 76 Neb. 855, at 857, the court says:

> "In planning a public work, municipal authorities are required to exercise reasonable care and judgment, and if the services of professional men, experts in the work contemplated, are needed, they should employ those who have all the knowledge and skill that experience in such work would naturally give them."

This case cites and follows *Diamond Match Co.* v. *New Haven,* 55 Conn. 510, which is to the same effect as the above quotation, but which goes further, to avoid confusion, by stating, on page 528:

> "We have not thought it necessary to consider the question so ably argued before us, whether the duty discharged by the town was a governmental one, because upon the theory which would hold the town to the highest liability, we think there was no negligence on the part of the selectmen by which the town could be made liable."

The synonymous terms "instrumentalities," "agencies," and "means," which are used indiscriminately by this court in the various cited cases dealing with constitutional tax exemption, are clearly terms selected, because of their broad significance, in order to be consistent with recognition of the states' entire freedom to accomplish their governmental purposes by any method they should choose to adopt.

It is indisputable that the designing of public works is a well-defined form of governmental activity, and that the use of engineering advice in determining on plans for such public works is the one element best calculated to insure the success and effectiveness of such plans. Then surely the application of such advice to the legislative choice of the plan ineradicably stamps such advice as a means or instrumentality used in the exercise of the legislative function.

It is readily demonstrable that consulting services in rendering advice to guide the legislative choice of a plan for a public work are used in the exercise of the legislative function instead of the exercise of the particular function that may thereafter be involved in operating under the plan. For example, the operation of a meat market or a coal-yard by a municipal corporation is a private or proprietary function; the question whether the city shall engage in such a private enterprise is a governmental question and the determination of that question is purely a governmental function—the legislative determination of how the city may best use its resources for the benefit of its inhabitants. Any means utilized by the city in acquiring knowledge, information, or advice, to the end that it may reach a wise conclusion on the question, obviously is primarily incident to the determination of the question, and is therefore primarily an incident to, or means employed in, the exercise of the legislative function involved. The strictly legislative quality of the determination of the question and of the incidents to such determination cannot be altered by the fact that the particular question may involve proprietary activities of the city or may result in the city engaging in such activities.

The facts before the court in several of the instances involved in this suit furnish a forceful illustration of this distinction; that is, in several of the instances of consultation on municipal legislative problems with regard to sewerage or waterworks matters, it appears only that the advice was given on the problem, but not whether it was followed or if any waterworks or sewerage work such as was contemplated was done. Assuming that such work was not done, then it is clear that the consulting services must have been incident to the performance of the legislative function, because the exercise of that function definitely resulted in there being no other function exercised to which such service could have been incident. On the other hand, had the city's decision after receiving the advice been to adopt an extensive construction plan, it is equally clear that the consulting service would have been primarily incident to the decision, and not to the construction.

(*b*) *The plaintiffs were means used by the various states or political subdivisions thereof in determining upon the plan of a public work in the following cases presented by the record: Medfield State Hospital (second and third items), Nahant, Milwaukee, New Haven, Dayton (both items), Buffalo, Framingham, Lynn, Torrington, Kennebec Water District, North Shore Sanitary District, Plainfield, and Billerica.*

The facts with regard to the several items specified above are stated in the Record at pages 9 to 12, the facts applicable to the individual items being segregated in separate paragraphs under the above names, respectively. It appears necessary only to invite the attention of the court to the fact that in each of these instances the services of the plaintiffs were the rendition of advice to the respective states and cities with regard to the question whether to undertake a public work, or with regard to the plan for a public work. The nicety with which these facts fit in with the pattern of the law, in accordance with the authorities hereinabove assembled, is itself a demonstration that in the named instances *the plaintiffs were means or instrumentalities used by the several states and cities in the exercise of their legislative governmental function.*

(2) THE ESTABLISHMENT OF A PUBLIC WATER SUPPLY MAY INVOLVE THE EXERCISE OF A GOVERNMENTAL FUNCTION.

While the operation of a public water-supply system is usually considered a proprietary function, there are certain aspects in which it is clearly governmental.

(*a*) *The provision in a municipal waterworks system of facilities, repairs, and supplies for the purpose of meeting the requirements of fire-protection service is a strictly governmental function.*

Jewett v. *New Haven,* 38 Conn. 368.
Wilcox v. *Chicago,* 107 Ill. 337.
Robinson v. *Evansville,* 87 Ind. 334.
Burrell v. *Augusta,* 78 Me. 118.
Fisher v. *Boston,* 104 Mass. 87.
Tainter v. *Worcester,* 123 Mass. 311.
Grube v. *St. Paul,* 34 Minn. 402.
Heller v. *Sedalia,* 53 Mo. 159.
Springfield Ins. Co. v. *Keesville,* 148 N.Y. 46.
Frederick v. *Columbus,* 58 Ohio St. 538.
Grant v. *Erie,* 69 Pa. St. 420.
Welsh v. *Rutland,* 56 Vt. 228.
Cunningham v. *Seattle,* 40 Wash. 59; 42 Wash. 134.

It is a matter of common knowledge that the almost universal practice of municipalities is to provide and maintain one waterworks system for the two purposes of furnishing water to their inhabitants and of fire protection. The furnishing of water to its inhabitants for their private purposes is under some circumstances a proprietary function; the provision of means for fire protection is demonstrated to be a governmental function. There is, therefore, an obvious mixture of the two kinds of functions in the one enterprise; but it is equally obvious that many phases of the fire-protection activities are readily susceptible of segregation and distinguishment from the proprietary activities in connection with the system, and the authorities show that, when they are so segregated and so distinguishable, the courts must recognize the governmental quality of such fire-protection activities.

In *Tainter* v. *Worcester*, 123 Mass. 311, the court, per Gray, C.J., says, on page 316:

> "The works to be constructed by the city of Worcester under the Statute of 1864 were, so far as related to safeguards against fire, to be erected and maintained by the city for the benefit of the public and without pecuniary compensation or emolument."

In *Aschoff* v. *Evansville*, 34 Ind. App. 25, 33, the court says:

> "The use alleged to have been made of the waterworks system at the time of the injury complained of was a purely governmental one, namely, extinguishing fires. For an injury incidental thereto there is no right of recovery. To shut off the water might have involved the entire cessation of efforts to extinguish such fire."

Other cases in which the state courts have deemed the fire-protection activities involved to be capable of segregation and distinguishment from the mere water-furnishing function, and accordingly entitled to recognition as a governmental function, are the following:

Grant v. *Erie,* 69 Pa. St. 420, in which the basis of claimed liability was failure to maintain sufficient reservoirs to meet fire protection needs;

Mendel v. *Wheeling,* 28 W. Va. 233, 262, and 263, in which the basis of claimed liability was negligently allowing water pipes to become so filled up as to be incapable of delivering enough water for fire protection (this case being also one in which an extensive review of cases on governmental functions generally is set forth);

Brinkmeyer v. *Evansville,* 29 Ind. 187, and—

Wheeler v. *Cincinnati,* 19 Ohio St. 19—in each of which the basis of claimed liability was failure to maintain sufficient water supply to meet fire-protection needs.

(*b*) *The plaintiffs were means used by the state in providing facilities for fire-protection purposes in a municipal waterworks system in the following cases: Nahant and Dayton* (*both items*).

In the Nahant item (Record, p. 9) the plaintiff's services were the study of the problem of additional fire protection and the devising of a program of pipe extensions to meet the requirements of fire protection. Such activities are clearly identified as within the function of fire protection.

In the Dayton items (Record, pp. 10 and 11) the plaintiffs' services were applied to the devising of a plan to meet a peculiar fire-protection requirement, and to assisting in carrying out that plan. Such services are also clearly identified as definitely within the fire-protection function.

(*c*) *The selection of a pure and wholesome supply of water is a strictly governmental function.*

There can be no doubt that the selection of a source from which a pure and wholesome supply of water for the use of the inhabitants of a populous city can be derived is vitally essential to the public health and welfare, and is to be entirely distinguished from the distribution of water brought into the city to the householders at a price adequate to pay the cost of the undertaking. The one is a purely governmental function, in the same manner as the determination of the plan of a sewer system or any other public work essential to the public health, safety, or welfare; the other is a private or commercial enterprise.

The cases already cited show that the determination of the plan of a public work is a governmental function in every instance; but in the case of a public water supply a further element enters into the case, namely, that in the selection of the source of a public water supply the primary consideration is the public health, and it is a governmental function to guard the public health which would be exercised in approving the source of a water supply whether the water was to be furnished by the city, by a public service corporation, or by individuals. That the water, when brought into the city, is distributed and sold as a commodity by the city cannot make the protection of the source any less governmental than if the water was sold by others.

The case of *Stansbury* v. *Richmond,* 116 Va. 205, at page 207, furnishes a statement of the law directly in point with the particular facts which are before the court in this case, as follows:

> "The adoption of a plan for supplying a city or a given section of it with water involves the exercise of a delegated governmental power; and an error of

judgment with respect to the efficiency and adequacy of such a plan is not in the first instance reviewable by the courts."

(*d*) *The plaintiffs were means used by the state in the selection of a pure and wholesome supply of water in the case of the Kennebec Water District.*

It appears (Record, p. 20) that the services of Mr. Metcalf were engaged by the Kennebec Water District as Chief Engineer of the district in connection with the establishment of a new water supply, which was required because there was a serious typhoid epidemic in the district, due to the fact that water was taken from a polluted source, and it was desired to go to a more distant, unpolluted source, which would be safe for the community.

(3) THE MAINTENANCE BY THE STATE OF A HOSPITAL FOR MENTAL DISEASES IS A STRICTLY GOVERNMENTAL FUNCTION.

There appears to be no disagreement among the authorities on the proposition that the creation and maintenance by a state of a hospital for the insane are purely governmental functions.

It was said by the court in the case of *Leavell* v. *Western Kentucky Asylum for Insane,* 122 Ky. 213:

> "Appellee is purely an eleemosynary institution created by the state and maintained at its expense for the beneficent purpose of caring for such of its citizens as may be . . . of unsound mind, and by reason thereof disqualified for the duties of citizenship and of caring for themselves. Such institutions are mere instrumentalities of the state government brought into being to aid in the performance of governmental duty, hence the rule of respondeat superior does not apply to them."

In *Maia* v. *Eastern State Hospital,* 97 Va. 507, the court said, at page 509:

> "An examination of the statutes creating and continuing this hospital shows that it was created and exists for purely governmental purposes, and is under the exclusive ownership and control of the State."

This opinion then goes on to point out that the statutes show its creation for the care and treatment of the insane; that it was first a body of trustees, and later a corporation having no members other than directors appointed by the governor, who are—

> ". . . public officials who are endowed with corporate being for a more convenient administration of the powers imposed upon them by law; that the money necessary to defray its expenses is provided by annual appropriations out of the public treasury; that the manner of handling such funds is prescribed by statute and that the directors are required to make regular reports to certain designated state officers."

The court then says, on pages 509 and 510:

> ". . . the defendant is a public corporation governed and controlled by the state, and acts exclusively as an agency of the state for the protection of society and for the promotion of the best interests of the unfortunate people of the Commonwealth of insane or disordered minds."

In *White* v. *Alabama Insane Hospital,* 138 Ala. 479, the court says, at pages 482 and 483:

> "A mere cursory reading of the act establishing the defendant, and of the statutes passed since, will suffice to show, without going into details, that it is a mere state agency created for the purpose of caring

for and treating the unfortunate insane citizens of the State—a purely governmental function, wise and beneficial."

Other cases supporting this principle are as follows:

> *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432.
> *Benton* v. *Boston City Hospital*, 140 Mass. 13.
> *Martin* v. *State of New York*, 120 App. Div. (N.Y.) 633; 104 N.Y. S. 540.
> *Fordham* v. *Thompson*, 144 Ill. A. 342.

The governmental quality of the maintenance and operation by a state of a hospital is not affected by the fact that patients who are able to pay are required to do so.

> *Fordham* v. *Thompson, supra.*
> *McDonald* v. *Massachusetts General Hospital, supra.*
> *Benton* v. *Boston City Hospital, supra.*
> *Downs* v. *Harper Hospital*, 101 Mich. 555.

The case of *Downs* v. *Harper Hospital*, last above cited, makes a clear statement of the reason for this rule, in the following language:

> "The fact that patients who are able to pay are required to do so does not deprive the defendant of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations. The amounts thus received are not for private gain but contribute to the more effectual accomplishment of the purpose for which the charity was founded."

(*a*) *The plaintiffs were means used by the state in the maintenance of a hospital for mental diseases in the following instances: Medfield State Hospital (all three items).*

The facts established by the evidence in connection with the three above-specified items appear in the transcript of the record at page 9. In addition to such evidentiary showing there are further relevant facts established by the statutes of Massachusetts of which the court takes judicial notice.

The courts of Massachusetts take judicial notice of statutes creating public corporations, recognizing such statutes as public statutes.

> *Portsmouth Livery Co.* v. *Watson*, 10 Mass. 91, 92.
>
> *Ellis* v. *Bristol County Commissioners*, 2 Gray (Mass.), 370, 378.

The United States Supreme Court will take judicial notice of the laws of every state, including private acts, at least when the laws of the state give such acts the status of public statutes.

> *Junction Railroad Co.* v. *Bank of Ashland*, 12 Wall. 226, 230.
>
> *Hanley* v. *Donahue*, 116 U.S. 1, 6.
>
> *Case* v. *Kelly*, 133 U.S. 21, 27.

The relevant portions of the statutes of Massachusetts showing the purposes for which the Medfield State Hospital was established and the ownership and control of the hospital by the state are therefore cited and quoted in the accompanying footnote.*

*Chapter 425 of the Mass. Acts of 1892 is in part as follows:

"SECTION 1. The governor with the advice and consent of the council shall appoint seven persons . . . who shall constitute a board of trustees

It is submitted that the statutes quoted establish it as an indisputable fact that the Medfield State Hospital is a state agency and that its maintenance and operation by

of the new asylum for the chronic insane, to be designated and known as the Medfield Insane Asylum . . . Said board of trustees . . . shall choose a committee of three of its members, to be known as a building committee, who shall have entire charge of the construction of said hospital buildings . . .

"SECTION 2. The building committee . . . shall cause to be erected . . . suitable buildings for an asylum for the chronic insane . . . and shall provide for the equipment, including . . . sewerage fixtures . . . of such buildings. . . .

"SECTION 3. To meet the expenses incurred by said building committee under the provisions of this act, there shall be allowed and paid out of the treasury of the Commonwealth a sum not exceeding five hundred thousand dollars. . . .

"SECTION 4. Whenever the asylum buildings are . . . completed . . . . the trustees shall notify the governor, who shall thereupon issue his proclamation establishing the Medfield Insane Asylum; and thereafter, . . . all the laws relative to state lunatic hospitals and to persons committed thereto on the ground of insanity, so far as they may be applicable, shall apply to said asylum and to persons committed thereto."

Chapter 442 of the Mass. Acts of 1914 is in part as follows:

"SECTION 1. The Medfield State Asylum is hereby made a state hospital for the care of the insane and shall be subject to all the provisions of law applicable to such state hospitals.

"SECTION 2. The name of the Medfield State Asylum is hereby changed to the Medfield State Hospital."

Chapter 19 of the General Laws of Massachusetts, 1921, creates the state "Department of Mental Diseases" and provides that the boards of trustees of certain "public institutions," including the Medfield State Hospital, "shall serve in the department."

Chapter 123 of the General Laws of Massachusetts, 1921, provides at great length and detail in its one hundred and twenty-four sections for the maintenance, operation, and control by the state, through the Department of Mental Diseases, of the state institutions for the insane, including the Medfield State Hospital.

Section 2 of chapter 123 is in part as follows: "The commonwealth shall have the care, control and treatment of all insane, feeble-minded and epileptic persons, . . . and of each person who shall hereafter be received into any state hospital . . ."

Substantial appropriations from the general revenue of the state for the Medfield State Hospital are annually included in the general appropriation acts of the state.

In 1924, by chapter 126, items 470 and 471, Acts of 1924, the state appropriated from general funds for this hospital a total of $602,140. In 1923, by chapter 126, items 471 and 472, Acts of 1923, the state appropriated from general funds for this hospital a total of $586,116.58. In 1922, by chapter 129, items 483 and 484, Acts of 1922, the state appropriated from general funds for this hospital a total of $622,230. In 1917, the taxable year in issue in this case and the year in which the work in question was done and income therefrom received by the plaintiffs, the state, by chapter 212, eighth item, of the Acts of 1917, appropriated for this hospital from the treasury of the commonwealth, from the ordinary revenue, $441,859.49.

the state is a purely governmental function. It is equally obvious that the services of the plaintiffs rendered in connection with the maintenance of a sewerage system in the hospital plant were means used in the exercise of the function of maintaining a hospital, and consequently were purely governmental.

(4) THE MAINTENANCE OF PUBLIC PARKS BY A CITY IS A STRICTLY GOVERNMENTAL FUNCTION.

In *Clark* v. *Waltham*, 128 Mass. 567, at 569, the court says:

> "Nor can the town be held liable on the ground that it suffered a dangerous place to exist in the park, and failed to give proper notice to persons using the park by its invitation or license. It holds the park, not for its own benefit or emolument, but for the direct and immediate use of the public. If it can be said that there is any duty to construct paths over it, or to keep such paths in repair, it is a corporate duty, imposed upon it as the representative and agent of the public and for the public benefit."

In *Blair* v. *Grainger*, 24 R.I. 17, a case in tort for negligence in which the place of injury was a public park, the court says:

> "The city of Providence, for aught that appears, seems to have been in the discharge of a governmental power, engaged in the performance of a public service, in which it had no particular interest, and from which it derived no special benefit or advantage in its corporate capacity, but which it was bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community."

Other authorities for the proposition that, in establishing and maintaining public parks, municipalities act in their governmental and not in their proprietary capacity are as follows:

> *McGraw* v. *District of Columbia,* 3 App. D.C. 405.
> *Harper* v. *Topeka,* 92 Kans. 11.
> *Park Commissioners* v. *Princz,* 127 Ky. 460.
> *Steel* v. *Boston,* 128 Mass. 583.
> *Bisbing* v. *Asbury Park,* 80 N.J. L. 416.
> *Nashville* v. *Burns,* 131 Tenn. 281.
> *Russell* v. *Tacoma,* 8 Wash. 156.
> Dillon on Municipal Corporations (5th ed.), vol. IV, p. 2838, sec. 162.

(*a*) *The plaintiffs were means used by the city in the maintenance of its public parks in the New Haven item of income.*

The facts stated in the record with reference to this item (see Record, p. 10) demonstrate that the service in question was rendered for the purpose of assuring proper drainage, or freedom from seawater, of one or more of the municipal parks of the City of New Haven. An additional element showing the governmental quality of such activity is section 446 of Connecticut General Statutes, Revision of 1918, of which the court takes judicial notice, and which is, in its relevant parts, as follows:

> "Any city or borough may establish, maintain and conduct public parks, playgrounds, recreation places, and public gardens; may acquire by purchase or lease, or otherwise, land and property necessary thereto; . . . and may provide by ordinance or by-law for the proper management and conduct thereof; . . ."

Since proper drainage must be recognized as an essential step in the maintenance of public parks, it is clear that the service rendered was in furtherance of the performance by the city of its duty to properly maintain its public parks, and that therefore the plaintiffs' service was a means used in the city's exercise of a purely governmental function.

(5) THE SUPERVISION OF CONSTRUCTION OF A PUBLIC WORK, BEING FOR THE PURPOSE OF ASSURING THAT SUCH CONSTRUCTION IS IN ACCORDANCE WITH THE MUNICIPAL PLAN THEREFOR, IS A STRICTLY GOVERNMENTAL FUNCTION.

When a public work has been constructed by a city, with no want of skill, in accordance with the plan therefor adopted by the city in the reasonable exercise of its discretion, one who has suffered injury by reason of the design of the work cannot hold the city liable.

Johnson v. *District of Columbia,* 118 U.S. 19.
Mills v. *Brooklyn,* 32 N.Y. 489.
Child v. *Boston,* 4 Allen (Mass.), 51.

The reason for this rule, as recognized by the above cases, is that the construction of such a work in such a manner is the result of the exercise of a strictly governmental function of the city in choosing the plan thereof. Then surely an activity of the city designed to assure itself that the planned work shall be actually constructed in exact accordance with the governmental plan is equally governmental with the choice of the plan. *Merrifield* v. *Worcester,* 110 Mass. 216, 221. It being obvious and inescapable that supervision of such construction provided for by the city is designed mainly, if not exclusively, for the purpose of assuring the city that the construction shall be in accordance with the plan, it must follow that such supervision is governmental, and therefore that the means by which such supervision is accomplished is a governmental means.

(*a*) *The plaintiffs were means used by the various political subdivisions of states in supervising the construction of public works in the following cases: Dayton (second item), Canton, Sherburne, and Kennebec Water District.*

The facts set forth in the record as to these items (as to Dayton, 2d item, see Record, p. 11; Canton, Record, p. 11; Sherburne, Record, p. 11; and Kennebec Water District, Record, p. 20) show that in each of the named instances plaintiffs supervised for the respective political units the work of construction of a public work by a third party under contract. The propositions of law above set forth are obviously application and controlling of such facts.

(6) THE SUPERVISION OF OPERATION OF A MUNICIPAL SEWAGE-TREATMENT PLANT IS A STRICTLY GOVERNMENTAL FUNCTION.

There are some decisions, hardly applicable to modern conditions, which treat the construction and maintenance of sewers as a proprietary activity of a city or town. These decisions are in part based upon the fact that sewers and drains were formerly built by private enterprise, and in part because they were paid for by special assessments.

There can, however, be no room for doubt that, when other sufficient means of sewage disposal are unavailable, the provision and operation of a sewage-treatment plant is essential to the protection of the public health; and it is equally indisputable that the protection of the public health is the primary and controlling purpose of the creation and operation of such plants by cities. Whether or not the financial arrangements may be such as to classify the general maintenance and operation of a sewer system among the proprietary activities of the municipality, nevertheless the plain distinction between the general activity of providing sewage outlets for individual premises and the particular activity of municipal inspection and supervision of the sewage-treatment plant to assure the effectiveness of the operation of the plant to accomplish its service in the protection of the public health must be recognized. The inspection and supervision for such purpose is exactly the sort of clearly governmental course that municipalities would adopt, and do adopt, in connection with the operation for profit by private parties of all enterprises directly affecting the public health. It would not be seriously asserted that inspection and supervision of the operation of such private enterprises is not a strictly governmental function. It is thereupon submitted that the plainly separate activity of supervision and inspection of its own enterprise in order to protect the public health is just as clearly identified as a strictly governmental function.

(*a*) *The plaintiffs were means used by the city in supervising the operation of a sewage-treatment plant in the following cases: Marlboro, Medfield State Hospital (first item), and Schenectady.*

The facts set forth in the record (as to Marlboro, Record, p. 9; as to Medfield State Hospital, 1st item, Record, p. 9; and as to Schenectady, Record, p. 10) show that the service rendered to each of these political units was the supervision for such unit of the operation of its sewage-treatment plants. In other words, the political unit accomplished its supervisory function through its use of the plaintiffs' services.

The supervisory activities of the plaintiffs in each of these matters were distinctly isolated from the general activities in connection with the operation of the sewer system. They were employed and paid solely for supervision. Upon these facts it is submitted that the services of the plaintiffs in these items were means by which the respective political units exercised a strictly governmental function.

(7) THE PROVISION, MAINTENANCE, AND OPERATION BY A CITY OF A SEWAGE-TREATMENT PLANT IS A STRICTLY GOVERNMENTAL FUNCTION.

Not only is the supervision of the operation of a plant for the disposal, treatment, or purification of sewage a governmental function, but the provision, maintenance, and operation of such a plant is also separable from the provision, maintenance, and operation of that part of the sewer system designed to carry away sewage from the premises of individuals for compensation by way of assessments or otherwise, and is also a purely governmental function.

Three Massachusetts cases concerning the sewerage problem of the City of Worcester confirm the distinction asserted. The first case, *Merrifield* v. *Worcester*, 110 Mass. 216, asserts the private tort liability of the city for negligence in the operation and maintenance of its sewer system, and in the construction of the system, except negligence inherent in the plan adopted therefor. The second case, *Morse* v. *Worcester*, 139 Mass. 389, asserts the independence of a sewage-treatment plant from an ordinary sewer system. The court says in that case, on page 393:

> "The power to convert the brook into a sewer carries by implication the power to expend money for any plan of work which is an incident or part of the main work, but it would seem that the statute does not give the defendant power to take lands or expend money for an independent system of sewage purification. If such system is rendered necessary by the

> construction of the sewer, the remedy must be sought from the Legislature, which can best adjust and settle the conflicting rights and interests of the public and of the riparian owners upon the river."

In the third case, *Harrington* v. *Worcester,* 186 Mass. 594, the court asserts that the provision of that independent system of sewage purification is governmental, and, on page 598, that the act providing for its provision, maintenance, and operation—

> ". . . is a measure in the interest of the general public, looking particularly to the protection of the health of the people living near the Blackstone River, and that the duty to make this provision was imposed as other public duties which rest upon cities and towns are imposed, like the duty to provide for the education of children, or the duty to establish and maintain the ordinary institutions of the government."

(*a*) *The plaintiffs were means used by each of the various political subdivisions of states in the provision, maintenance, or operation by it of a sewage-disposal plant in the following cases: Marlboro, Medfield State Hospital (all three items), Schenectady, Milwaukee, and Plainfield.*

The facts set forth in the record (as to Marlboro, Record, p. 9; as to Medfield State Hospital, Record, p. 9; as to Schenectady, Record, p. 10; as to Milwaukee, Record, p. 10; as to Plainfield, Record, p. 11) establish the propositions that in the foregoing cases the plaintiffs served each of the above-named political units in the performance for such unit of some phase of its activities incidental to and contributing to the accomplishment of its public duties in providing, maintaining, or operating municipal sewage-treatment plants. In other words, the plaintiffs' services were used by such political units in the exercise of their governmental functions.

IV.

It is not within the power of the United States to tax the plaintiffs on any of the items of income above specified.

Upon the authorities hereinbefore presented, it appearing that (1) the services of these plaintiffs were acquired by the various political units by a method and in a capacity satisfactory to such units; that (2) such services were utilized by such units as a means of exercising certain definite functions of such units; and that (3) each of such functions specified in the above-considered items was a strictly governmental function; it follows as a matter of constitutional law that the compensation of the plaintiffs for such services may not be taxed by the United States.

At this point, for the purpose of facilitating the application of the constitutional principles to the various items controlled thereby, a classification of such items, showing the reasons urged as to each why it is the exercise of a governmental function and thus beyond the federal taxing power, is submitted below as follows:

CLASSIFICATION OF ITEMS.

(1) *Marlboro.*
  (*a*) Supervision of operation (see III 6 and 6*a* of this brief).
  (*b*) Operation of sewage-disposal plant (see III 7 and 7*a*).
(2) *Medfield State Hospital* (*1st item*).
  (*a*) Supervision of operation (see III 6 and 6*a*).
  (*b*) Maintenance of State Insane Hospital (see III 3 and 3*a*).
  (*c*) Operation of sewage-disposal plant (see III 7 and 7*a*).

(3) *Medfield State Hospital (2d and 3d items).*

(4) (*a*) Maintenance of State Insane Hospital (see III 3 and 3*a*).
  (*b*) Legislative choice of plan (see III 1, 1*a*, and 1*b*).
  (*c*) Provision of sewage-disposal plant (see III 7 and 7*a*).

(5) *Nahant.*
  (*a*) Fire protection (see III 2, 2*a*, and 2*b*).
  (*b*) Legislative choice of plan (see III 1, 1*a*, and 1*b*).

(6) *Schenectady.*
  (*a*) Supervision of operation (see III 6 and 6*a*).
  (*b*) Operation of sewage-disposal plant (see III 7 and 7*a*).

(7) *Milwaukee.*
  (*a*) Legislative choice of plan (see III 1, 1*a*, and 1*b*).
  (*b*) Provision of sewage-disposal plant (see III 7 and 7*a*).

(8) *New Haven.*
  (*a*) Maintenance of parks (see III 4 and 4*a*).
  (*b*) Legislative choice of plan (see III 1, 1*a*, and 1*b*).

(9) *Dayton (1st item).*
  (*a*) Fire protection (see III 2, 2*a*, and 2*b*).
  (*b*) Legislative choice of plan (see III 1, 1*a*, and 1*b*).

(10) *Dayton (2d item).*
  (*a*) Fire protection (see III 2, 2*a*, and 2*b*).
  (*b*) Legislative choice of plan, as to design part (see III 1, 1*a*, and 1*b*).
  (*c*) Supervision of construction, as to supervision part (see III 5 and 5*a*).

(11) *Canton and Sherburne.*

(12) (*a*) Supervision of construction (see III 5 and 5*a*).

(13) *Buffalo.*
(14) *Billerica.*
(15) *Framingham.*
(16) *Lynn.*
(17) *Torrington.*
(18) *North Shore Sanitary District.*

As to each, legislative choice of plan (see III 1, 1*a*, and 1*b*).

(19) *Plainfield.*

- (*a*) Legislative choice of plan (see III 1, 1*a*, and 1*b*).
- (*b*) Operation of sewage-disposal plant (see III 7 and 7*a*).

(20) *Kennebec Water District.*

- (*a*) Legislative choice of plan, as to design part (see III 1, 1*a*, and 1*b*).
- (*b*) Supervision of construction, as to supervision part (see III 5 and 5*a*).
- (*c*) Prevention of disease (see III 2*c* and 2*d*).

The assignment in the above classification of more than one reason for exemption as to several of the items serves to accentuate the fact that, as to some departments of municipal activity, any action therein by the city is strictly governmental: as, for instance, the fire-protection department; while, as to other departments, the general nature of which is proprietary, certain activities of the city affecting such proprietary departments are nevertheless strictly governmental; as, for instance, the legislative choice of a plan for a waterworks system.

V.

The plaintiffs may be held to be free from taxation on the items of income involved here without a decision that the statute is unconstitutional.

(1) UPON A NOT UNREASONABLE CONSTRUCTION OF THE WORD THE PLAINTIFFS WERE "EMPLOYEES" OF STATES AND POLITICAL SUBDIVISIONS OF STATES.

It will be remembered that the statute under which the tax now under consideration was assessed specifically exempts the compensation of officers and employees of states and of political subdivisions of states. It is a well-established principle that a statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts on that score.

> *United States* v. *Delaware & Hudson Co.,* 213 U.S. 366, 408.
>
> *United States* v. *Jin Foey Moy,* 241 U.S. 394, 401.

In the case last cited the court said, at page 402:

> "Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point."

In *Plymouth Coal Co.* v. *Pennsylvania,* 232 U.S. 531, the court said, at page 546:

> "If a statute is susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority."

Similar citations could be multiplied indefinitely, and the principle set forth in them is firmly established.

In applying this principle to the case at bar it is to be noted that there is nothing in the Revenue Act which limits the exemption to regular and permanent employees of a state or a political subdivision of a state; this limitation has been established entirely by departmental rulings; the statutory word to be construed in the light of the constitutional limitation upon the powers of Congress and the principle of construction set forth above is simply "employee."

It may well be conceded that for certain purposes and in certain connections the word "employee" means "a person in the regular and permanent service of another."

But, as was said by Holmes, J., in *Towne* v. *Eisner,* 245 U.S. 418, at page 425:

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary in character and content according to the circumstances and time in which it is used."

It is said in 20 Corpus Juris, 1242, that the word "employee"—

> ". . . has neither technically nor in general use a restricted meaning by which any particular employment or service is indicated, and that it may have different meanings in different connections admits of no doubt."

One of the definitions of "employee" given in Corpus Juris is—

> "any one who renders labor or services to another."

We submit that the decisions warrant this definition, and that an ordinary, usual, and proper usage of the term "employee" gives it a meaning broad enough to include any person rendering personal service to another for compensation; and that a reasonable construction of the Revenue Act of 1917 would exempt from the excess-profits tax the compensation of officers and all other persons engaged in the personal service of a state or any political subdivision thereof.

We must concede that there are a great many instances where the term "employee" as used in a particular statute or instrument has been held in such instance to carry the shades of meaning connoting permanency of the relation and also a relationship of master and servant. Many such cases were cited to the trial court—and many more similar cases could have been cited. On the other hand, there are many cases holding in other particular instances that the term "employee," as used in the particular statute or instrument involved, carried no connotation either of permanency or of a strict master-and-servant relationship.

Thus in *Gurney* v. *Atlas &c. Ry. Co.*, 58 N.Y. 358, it appeared that a receiver was directed to pay debts "owing to the laborers and employees" of the corporation, and an attorney made a claim for compensation for professional services as counsel in important litigation for the company. It was contended that "it was only those who had stated and regular employment" that were provided for, but the court rendered judgment for the claimant, saying, at page 366:

> "It is manifest that literally and lexically the claimant was an employee of the company; that is, he was employed by and rendered important service for them."

In *Watson* v. *Watson Manufacturing Co.*, 30 N.J. Eq. 586, a drayman who carried goods for a company with his own horses and wagons and whose work for the company was not wholly constant or exclusive was held to be an employee within the meaning of a statute, the court saying:

> "The word 'employee' properly describes any one who renders labor or service to another."

In *Yazoo Railroad Co.* v. *Slaughter*, 92 Miss. 289, it was held that, when the keeper of a railroad pumping station, desiring to absent himself for a short time, placed his fourteen-year-old son, by consent of the superintendent of the road, temporarily in charge of the station and left the premises, the son was thereby made an employee of the railroad company.

In *Farmer* v. *St. Croix Power Co.*, 117 Wis. 76, it was said that the significant element in the relation of employee is the rendering of the personal service, as distinguished from a contractor, by whom a piece of work as an entirety is to be performed.

In *Moore* v. *Heaney*, 14 Md. 558, it was held that a person who contracts for 5 per cent of the cost of a building to superintend and direct the erection of the building is an employee of the owner of the property.

In *Seaboard Air Line Ry.* v. *Continental Trust Co.*, 166 Fed. 597, it was held that the "division counsel" of a railroad company was an employee, although paid by fees on accounts rendered and audited at stated intervals instead of by salary, and although he was at liberty to take cases for other clients, except cases against the railroad which employed him.

The diversified holdings of courts with regard to the specific meaning to be attached to the word "employee" under the differing sets of circumstances in which it has been used demonstrate that, instead of being a term having a single, specific legal significance, it is one having a high degree of adaptability, and one whose particular meaning and connotation is largely controlled by the particular circumstances and conditions under which it is used in the given instance.

Webster's Unabridged Dictionary gives the following single definition of "employe" (or "employee"): "one who is employed." And the same authority gives the following definitions, among others, of the verb "employ": "to use as a means or instrument for accomplishing, or as materials for forming anything; to use as an agent, servant or representative; to commission; to entrust."

The New Standard Dictionary gives the following definitions of "employe" (or "employee"): "a person who is employed; one who works for wages or salary; one who is engaged in the service of or is employed by another." And this authority gives the following definitions, among others, of the verb "employ": "to engage, have or keep for or in service or duty; procure or retain the service of; set or keep at work; furnish work or occupation for." There is also appended to the definitions of the verb a paragraph dealing with the refinements of meaning attached to the word, from which we quote as follows:

> "A person may be 'employed' in his own work or that of another. In the latter case the service is always understood to be for pay. In this connection, 'employ' is of more dignity than 'hire'; a general is 'employed' in his country's service, a mercenary adventurer is 'hired' to fight a tyrant's battle. . . . 'Engaged' and 'employed' may be said to apply also to men in the learned professions."

In the light of the above judicial and etymological authorities we think it clear that the term "employees" as used in the 1917 Revenue Act readily permits the meaning we urge to be applied to it. The meaning we urge is one of the well-recognized significances of the word. The clause was obviously put into the act in recognition of the constitutional limitation affecting the act. By giving the clause the interpretation we urge, it is thereby enabled accurately to accomplish its obvious sole purpose, and an available direct means is provided of so construing the statute as to make it render the necessary compliance and conformity with the Constitution. The rejection of such means involves holding the statute, or a clause thereof, unconstitutional, or of finding some other less direct means of making it perform its proper function.

We thereupon submit that the court can and should interpret the clause of the statute under consideration as coextensive with the constitutional limitation, and as including all persons whom a state or one of its political subdivisions may employ as a means or instrument to enable it to carry out its governmental functions, whether such persons are able and willing to enter into its permanent service or are experts engaged to advise it on particular undertakings.

The immediately foregoing consideration of the meaning of the term "employees" as used in the act is applicable to all of the items of income under examination here, for the reason that all "officers" are undoubtedly "employees"; but it does not follow that all "employees" are "officers," since the former is the more inclusive term.

But it is also urged that, in several of the instances involved here, each of the plaintiffs, in addition to being within the more inclusive class of "employees," was an "officer" of the political unit by which he was employed. The instance in which this is most clearly the case is that of the North Shore Sanitary District (Record, p. 20). In that matter it appears (1) that the position occupied by the plaintiff Eddy was created by a legislative act of the political subdivision; (2) that the duties thereof and the compensation incident thereto were prescribed by such legislative act; (3) that the occupancy of such position by the plaintiff Eddy was accomplished by means of his appointment thereto as distinguished from a contract of employment; and (4) that the plaintiff Eddy occupied such position for a substantial length of time.

It is said in *United States* v. *Hartwell*, 6 Wall. 385, at page 393:

> "An office is a public station or employment, conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument, and duties. The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe."

Among the authorities cited in the Hartwell opinion on the quoted point is the case of *United States* v. *Maurice*, 2 Brockenbrough, 103, a case in the United States Circuit Court, in which the decision and opinion were by Chief Justice Marshall. We quote from that opinion, on page 103, as follows:

> "Is the agent of fortifications an officer of the United States? An office is defined to be 'a public charge or employment,' and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or perform a service, without becoming an officer.
>
> "But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by govern-

> ment to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer."

It is submitted that a comparison of the facts shown to exist and the elements of the rule of law established by the above quotations demonstrate beyond question and beyond occasion for further argument that all but one of the elements necessary to constitute the plaintiff Eddy an "officer" of the Sanitary District are present. In regard to the one element, as to the permanency or continuity of the position referred to as persuasive in the first of the two cases above cited, it is submitted that on the facts shown the degree of permanency or continuity required to constitute the position an "office," and its incumbent an "officer," is also present.

An office may be created for the purpose of meeting a particular emergency, and the duration of the office may extend only while the emergency exists; but a person who holds such office is none the less an officer. No one would seriously contend that the Director General of Railroads during the late war was not an officer of the United States, or that the Fuel Administrators appointed by the several states were not officers of such states, although in each case it was understood that the office would terminate with the emergency which had called it into being.

There is no requirement that to constitute an office the services be continuous rather than occasional, or that the holder of the position devote his whole time to performing the duties imposed upon him, or that he have no other gainful occupation. A clerk of court in a sparsely settled county is no less an officer than a clerk of court in a populous community, although there may be days or weeks intervening between the occasions when he performs his functions. In fact, in the very case in which the emoluments of a state officer were held to be exempt from federal taxation, *Collector* v. *Day,* 11 Wall. 113, the office in question was that of the judge of the Probate Court of Barnstable County, Massachusetts, a sparsely settled county, and the court may well appreciate that the duties of the office do not require the full time of the occupant.

Neither is there anything incongruous in the conception of the plaintiffs in this case holding a number of different offices in different communities at the same time.

There is no principle of law that no man can hold more than one office at the same time. As was said by the court in *Commonwealth* v. *Kirby,* 2 Cush. (Mass.) 577, at page 581:

> "Individuals have been allowed to hold and exercise different offices, falling within different departments, where they were not specifically declared incompatible by other parts of the constitution, and where such individuals have not exercised both offices in reference to the same subject matter."

The consideration which has been given to the question of what offices are incompatible (see, for example, the twelve-page annotation on the subject in L.R.A. 1917-A, 216) demonstrates that there is no objection to one individual holding any number of offices at the same time provided their duties are not incompatible; and a multitude of cases cited on pages 224 and 225 of the above note hold that, the duties of certain specified offices not being incompatible, the offices may be held by the same person.

Among the cases which hold that, in the absence of constitutional or statutory provision to the contrary, or incompatibility of the duties, one person may hold more than one office at the same time are included *United States* v.

McCandless, 147 U.S. 692, and *United States* v. *Harsha*, 172 U.S. 561.

In small New England towns the same individual often holds many town offices, and may be a County Commissioner and a member of the state Legislature as well, and also a notary public and a justice of the peace. There is nothing incongruous or unusual in a recognition of Mr. Metcalf and Mr. Eddy as being officers of several different municipalities at one and the same time.

Some of the decisions, notably that of *Hall* v. *Wisconsin*, 103 U.S. 5, point out that a *usual* provision in the creation of an "office" is the requirement that the incumbent take an oath of office and give bond for the faithful performance of his duties. But whether such oath or bond is to be required is a question to be decided by the legislative body which creates the office, dependent upon whether it considers such oath and bond as desirable safeguards for the proper performance of its duties. The presence or absence of such safeguarding provisions cannot change the essential quality or classification of the position.

In the two instances in which the district judge held that the plaintiffs were officers, namely, that of the North Shore Sanitary District and that of the Kennebec Water District, he was undoubtedly correct. In the former case (Record, p. 20) Mr. Eddy had unquestionably all of the attributes of a public officer. In the latter case (Record, p. 20) it appeared that—

> "In 1904 Mr. Metcalf was engaged to act as Chief Engineer of the district and has continued as such up to the present time. . . . Payment was on a per diem basis with bills rendered monthly."

It does not specifically appear whether or not the position was created by vote of the governing body of the district, whether the duties of the position and the compensation were prescribed by such vote, or whether the plaintiff Metcalf occupied the position as a result of an appointment or of a contract of employment. He has already occupied the position continuously for over twenty years, so that it cannot be seriously argued that there was not a reasonable permanency of tenure. Inasmuch as the defendant is the excepting party with respect to this item, it does not appear how he can seriously argue that the finding and ruling of the district judge were wrong.

As to some of the items with respect to which the district judge found that the plaintiffs were not officers, it is submitted that he was in error. Thus in the case of the City of Marlboro (Record, p. 9) the plaintiff Eddy was engaged under authority of a state statute; his employment has continued from 1909 to date; regular employees of the city worked under his direction; and his salary was a fixed sum per month.

The item numbered 2 presented very similar facts; the plaintiffs were engaged by vote, the service was continuous from 1916 for a considerable period, regular employees worked under the direction of the plaintiff Eddy, and the compensation was an annual salary.

The item numbered 6 (Record, p. 10) (Schenectady) showed continuous employment by vote of the governing body at an annual salary.

The item entitled Milwaukee, Wisconsin, shows an appointment of Mr. Eddy as Consulting Engineer in 1917 by vote of the Sewage Commission, and a recognition of the service as continuous until it was discontinued in 1921.

In the cases of Canton and Sherburne (Record, p. 11) the plaintiffs took over the service and salary of an engineer receiving compensation on a monthly basis.

In the cases of Buffalo (Record, p. 11) and Lynn (Record, p. 12) the plaintiff Eddy was regularly employed as a member of a Board of Engineers, in the case of Lynn by vote of the City Council. The regular employees of the city in the latter case worked under his direction, and the employment lasted four or five years.

The plaintiffs therefore contend that they were employees of states or political subdivisions of states in all of the items before the court, and were officers in all of the items above mentioned, and that their compensation is exempt, under the statute, and without regard to the constitutional limitations upon the federal taxing power, except so far as they may tend to confirm this construction of the statute.

(2) EVEN IF THE PLAINTIFFS WERE NOT "OFFICERS" OR "EMPLOYEES" OF STATES OR POLITICAL SUBDIVISIONS THEREOF, BUT WERE OTHER APPROPRIATE INSTRUMENTALITIES USED IN THE EXERCISE OF STRICTLY GOVERNMENTAL FUNCTIONS, THE STATUTE MAY BE TREATED AS INAPPLICABLE TO THEM.

The contention of the plaintiffs does not lead to the choice of but two alternatives, namely, either that the plaintiffs were officers or employees within the meaning of the statute or that the statute itself was unconstitutional. Upon well-setted principles the case can be decided without the necessity of deciding that Congress exceeded the limits of authority bestowed upon it by the Constitution.

It is well settled that, if a statute in inclusive language covers a subject-matter beyond the constitutional powers of the enacting body, and such subject-matter is capable of separation from other and legitimate subjects of the legislation and is not of such relative importance that it may be supposed that, if the legislative body had realized that it could not affect the forbidden subject-matter, it would not have enacted the legislation at all, the statute itself will be sustained, but it will be held inapplicable to that which it could not constitutionally affect. Within certain limits the courts, in order to uphold a statute, may restrict its application to the legitimate field of legislation unless the act clearly indicates a different intention on the part of its framers. A statute need not be treated as unconstitutional and void for not containing an exception or qualification which the law will imply. The operation of a law in such cases may be restrained within constitutional limits without necessitating a decree that the act itself is void.

Among the more recent cases holding that a statute enacted in general terms will not be construed as applicable to cases to which it could not be constitutionally applied, although such cases were within the ordinary meaning of the words used in the statute, are the following:

> *United States* v. *Delaware & Hudson Co.,* 213 U.S. 366, 406, 407, and 408.
> *The Abby Dodge,* 223 U.S. 166, 175.
> *United States* v. *Jin Foey Moy,* 241 U.S. 394.

See also—

> *Re Van Vliet,* 43 Fed. Rep. 761.
> *Commonwealth* v. *People's Express Co.,* 201 Mass. 564, 575.
> 6 Ruling Case Law, 80, and cases cited.

But it is in the case of tax statutes that the principle now under consideration has been most frequently and generally applied. Occasionally a tax statute is fundamentally unconstitutional, but more frequently it appears that, as to some subjects, it is unquestionably valid, and the question arises whether it could be constitutionally applied to all subjects within the literal meaning of its provisions; and if not, whether on that account the statute itself is unconstitutional and void.

In such case much depends on the relative importance of the subjects of the tax within and without the constitutional power of the legislative body. Thus in *Pollock* v.

Farmers' Loan & Trust Co. (on rehearing), 158 U.S. 601, in which it was held that the income-tax law of 1894 was unconstitutional, the court first concluded that the tax on the income of real estate and personal property was a direct tax, and invalid because not apportioned among the states in accordance with population; but conceded that the tax on income from professions, trades, employments, or vocations was not a direct tax, and might be laid without apportionment. The court then laid stress on the vast amount of income derived throughout the United States from real estate, and concluded (at page 636):

> "It is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor. We cannot believe that such was the intention of Congress."

Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, the court felt constrained to hold unconstitutional the whole of so much of the Tariff Act of 1894 as related to the taxation of incomes.

No such proportion between the valid and invalid parts appears in the present case; the income of the few professional experts who are employed by states and municipal corporations in order to supplement their regular and permanent forces is a mere atom in the great mass of income reached by the 1917 Revenue Act. No one would suppose that Congress would not have enacted the War Revenue Act of 1917 if it knew that it could not tax the compensation of the instrumentalities by which states and political subdivisions of states performed their governmental functions. The case is the ordinary one in which a general statute is held inapplicable to a particular subject of taxation which comes within the literal meaning of its provisions.

It is believed that in every one of the cases cited in this brief in which a state tax was held to impose an unlawful burden on a federal instrumentality or a federal tax was held to impose an unlawful burden on a state instrumentality (except the Pollock case, *supra,* and *Crandall* v. *Nevada,* 6 Wall. 40, which is now generally considered as having treated the subject in the wrong manner) the court did not hold the statute unconstitutional or void, but merely decided that it could not be applied to the case before the court.

In such cases the Supreme Court does not approach the subject with that hesitancy which it expresses when asked to declare a statute unconstitutional and void.

Even the executive officers of the government, without awaiting a decision of the court, do not hesitate to declare an act of Congress inapplicable to a subject-matter within its literal terms if that subject is beyond the legislative power of Congress. For a persuasive authority on this point, bearing a close analogy to the case at bar, we quote in full an opinion of the Attorney-General of the United States, reported in 31 Ops. Atty.-Gen. 441:

> "May 6, 1919
>
> "Sir: I have the honor to acknowledge receipt of a letter from the Acting Secretary of the Treasury dated April 18, 1919, asking for an opinion as to whether the salaries of State officials and the salaries and wages of employees of a State are liable to the

> income tax imposed by the Revenue Act of 1918, approved Feb. 24, 1919. The letter is accompanied by the opinion of the Solicitor of Internal Revenue, to the effect that such salaries and wages are not subject to the tax in question.
>
> "In my opinion the Solicitor of Internal Revenue has reached the correct conclusion. This conclusion rests upon the well settled rule that the governmental agencies of the States are not subject to taxation by the Federal government, just as the governmental agencies of the Federal government are not subject to taxation by the States.
>
> "Collector v. Day, 11 Wall. 113—Pollock v. Farmers' Loan, etc. Co. 157 U.S. 429.
>
> "McCullock v. Maryland, 4 Wheat. 316, 427—Dobbins v. Commissioner, 16 Pet. 435.
>
> "The Act in question provides that the taxable income shall include, among other things, gains, profits and income derived from salaries, wages, or compensation for personal service. It does not specifically mention by way either of inclusion or exclusion, salaries or wages of State officials or employees.
>
> "Since, however, there can be no doubt that such wages and salaries are beyond the taxing power of Congress, it cannot be assumed that they were intended to be included under the general head of wages and salaries mentioned in the Act. The Act must be construed as applying only to such wages and salaries as can be constitutionally taxed by the Federal Government.
>
> "I am therefore of the opinion that they are not subject to the tax imposed by the act in question."

In inviting the attention of the court to the opinion just quoted, we wish to point out that the sole question submitted to and considered by the Attorney-General was whether the salaries and wages of state officials and employees were liable to the 1918 income tax, and that the opinion contains no indication that his conclusion would be different had the question submitted been as broad as the one now at bar in this case.

In holding that the Revenue Act of 1917 was inapplicable to the compensation of all governmental instrumentalities of states, the court will be merely performing an act of interpretation, necessary under our form of government in the case of almost all tax laws, state or federal.

VI.

The income of the plaintiffs does not cease to be exempt because the United States has seen fit to tax it to them jointly.

If the court is satisfied that neither Mr. Metcalf nor Mr. Eddy would be taxable on the income which he earned by his services for states and political subdivisions of states, the income does not cease to be exempt because the United States has seen fit to tax it to them jointly.

The excess-profits tax imposed by the Revenue Act of 1917 is peculiar in this particular, that partnerships, as such, are taxed. A partnership is not an entity distinct from the partners, but is merely a contractual relation under which the members agree to carry on their business jointly and to share profits and losses.

> *Francis* v. *McNeal*, 228 U.S. 695.
>
> *Hallowell* v. *Blackstone National Bank*, 154 Mass. 359.
>
> *Abbott* v. *Anderson*, 265 Ill. 285.
>
> *In re Peck*, 206 N.Y. 55.
>
> *Du Pont Powder Co.* v. *Jones Bros.*, 200 Fed. 638.

If the United States sees fit to tax the income of partners jointly, such income does not on that account cease to be exempt from taxation, if it was exempt when received by the partners. The statute by its terms operates on the partnership income as it finds it. It operates on it then as it is controlled by the partnership agreement. If, by the partnership agreement, the separate individual earnings of the partners are not part of the partnership income, then the tax cannot reach such earnings. If, by the terms of the partnership agreement, such separate earnings are part of the partnership income, then, within the purview of the statute, the earning of such separate income by the partner *ipso facto* makes such separate income partnership income. The separate earnings of the individual being exempt as they are earned, and being *ipso facto* income of the partnership, they must be exempt to the partnership because there can be nothing intervening to change their status or exempt quality. If the income of one of the partners is exempt, surely it does not cease to be exempt merely because the government sees fit to tax it in combination with other funds.

We also urge the further contention that, if the tax be recognized as a tax on the income of the partnership as a whole, then no question can arise as to a conversion of the fund earned by the individual from its exempt quality as income earned as a governmental instrumentality, because no such conversion occurs until a distribution of the partnership profits occurs, and that distribution must necessarily come after any tax on the income as a whole. If, on the other hand, the tax intends a reaching at the source, so far as may be, of the distributive shares of the partners, then it surely follows that each partner is entitled to have recognized as exempt to him all income he personally earned as a governmental instrumentality. In that connection it clearly appears from the evidence in this case, as to both Mr. Metcalf and Mr. Eddy, that the total of the income earned by him individually as a governmental means is less than the total of his distributive share of the partnership income; wherefore the partnership share of each individual must be held to include the income which was exempt to him individually.

In either of the above events the result will be a necessary recognition by the court of the exempt status of these items of income for all purposes incident to the case.

CONCLUSION.

The effect of the tax under consideration upon the governmental activities of the state or one of its political subdivisions is real and direct, and not remote or indirect. A city, in exercising its governmental functions upon matters vitally affecting the health and welfare of its people, is entitled to the best service available, and is entitled to select such instrumentalities as it deems best for rendering that service, without the leave or license of the federal government. In cases of vital importance it is entitled to the best expert service available. In these days of specialization the ordinary city engineer is not as capable in all of the branches of public-works engineering as the leading specialists in the different branches. If leading specialists in public-works engineering, who naturally earn substantial incomes, are bound to pay heavy income and excess-profits taxes to the United States on the compensation which they receive from states and political subdivisions of states, the burden of the tax is necessarily shifted to the municipalities which employ them, and a municipal corporation faced with important public engineering problems must either put up with the unspecialized service of an ordinary city engineer, or engage the "regular and continuous" service of leading specialists at salaries corresponding to their professional income, or else pay a heavy tax to the United States for the privilege of engaging specialists to perform the particular services for which they are needed. The Constitution of the United

States does not permit the Commissioner of Internal Revenue to impose any such grievous burden on the political subdivisions of a state, or to circumscribe the means by which they may exercise their governmental functions.

Respectfully submitted,
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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 183

LEONARD METCALF AND HARRISON P. EDDY, COPARTNERS Under the Name and Style of Metcalf & Eddy, Plaintiffs in error

v.

JOHN J. MITCHELL, FORMER COLLECTOR OF INTERNAL Revenue for the District of Massachusetts

---

No. 376

JOHN J. MITCHELL, FORMER COLLECTOR OF INTERNAL Revenue for the District of Massachusetts, Plaintiff in error

v.

LEONARD METCALF AND HARRISON P. EDDY, COPARTNERS Under the Name and Style of Metcalf & Eddy

---

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE FORMER COLLECTOR OF INTERNAL REVENUE

STATEMENT

The plaintiffs in error, Metcalf & Eddy, were consulting engineers who advised States and municipalities with reference to proposed water supply and sewage disposal systems. For these services their net income for the year 1917 was $15,721.13. Upon this portion of their net income they paid, under protest, a tax of $1,257.69, assessed under Sections 202, 209, of the War Revenue Act of 1917 (Act of October 3, 1917, c. 63, secs. 202, 209; 40 Stat. 300, 303, 307), and sued to recover the entire amount so paid.

Their income was derived from twenty distinct undertakings. They claimed that in each instance they were exempt from taxation (1) on the ground that they were expressly exempt by the Act itself, which provides (40 Stat. at 303):

> This title shall apply to all trades or businesses of whatever description, whether continuously carried on or not, except—
>
> (*a*) In the case of officers and employees under the United States, or any State, Territory, or the District of Columbia, or any local subdivision thereof, the compensation or fees received by them as such officers or employees;

and (2) on the ground that Congress has no power under the Constitution to tax the income in question.

The District Court decided (R. 17) that as to two items they came within the exception of the statute. In each of those two instances a member of the firm had apparently been made an official of a subdivision of a State. The former collector sued out a writ of error based upon this portion of the decision. The Government does not wish to press this writ of error. (No. 376.)

The court also decided that as to the other eighteen items the partners did not come within the exception of the statute and that the Constitution of the United States did not render them exempt from taxation. The partners sued out a writ of error challenging this decision.

SUMMARY OF ARGUMENT

1. The partners were not officials or employees of any State or local subdivision thereof in any of the undertakings here in question.

2. Congress has been expressly granted broad powers of taxation and it has been impliedly forbidden to tax instrumentalities of the States. While this limitation upon the taxing power should be given such effect as is necessary to carry out the purpose for which it exists, it should not be extended beyond its original scope.

3. Those who deal with a State, supplying materials or advice in accordance with contracts, are not in such intimate relations to the State as to be exempt from Federal taxation upon the ground that they are State instrumentalities.

4. The exemption of State instrumentalities from Federal taxation applies only to State activities of a governmental nature and not to activities undertaken in a proprietary capacity.

5. In many of these undertakings the services rendered by the partners to the State and local governments did not relate to governmental functions.

ARGUMENT

I

The partners were not officials or employees of any State or local subdivision thereof in any of the undertakings here in question

The Record expressly states that the members of this partnership took no oath of office in any of these undertakings (R. 12); that they were free to accept or refuse employment from all classes of people (R. 12); and that some of the engagements were temporary, while others ran on from year to year (R. 8). It is clear that in every instance recited in the Record the services rendered were simply those of consulting engineers. No official position was filled by the firm or by either member of the firm in any of the undertakings to which their writ of error relates.

In order to secure the exemption set forth in the statute it is not sufficient to show that a person rendered service to a State or to one of its political subdivisions and that he received compensation therefor. He must show that he was an officer or employee. To meet this test he must show that his services were continuous in their nature and not merely that they ran on from year to year. He must show that they were more than temporary or specific in character or object.

The term " officer " is inseparably connected with an office. But there was no office of sewerage or water-supply expert or sanitary engineer to which either partner was appointed. In every instance the undertaking related only to a particular case. Each undertaking stood apart by itself. The services were limited in duration and specific in their objects.

As this Court said in *Louisville, E. & St. L. R. Co.* v. *Wilson*, 138 U. S. 501, 505, where it was held that an attorney employed to render services in a particular transaction was not an employee,

> The terms "officers" and "employees" both, alike, refer to those in regular and continual service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employee. They imply continuity of service, and exclude those employed for a special and single transaction. An attorney of an individual, retained for a single suit, is not his employee. It is true, he has engaged to render services; but his engagement is rather that of a contractor than that of an employee.

The same position as to the meaning of the word "officer" has been taken by this Court in other cases. In *United States* v. *Hartwell*, 6 Wall. 385, where it held that the defendant was an officer of the United States within the meaning of a statute dealing with embezzlement, it said (p. 393):

> His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.
>
> A Government office is different from a Government contract. The latter from its

> nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

In the *Twenty Per Cent cases,* 20 Wall. 179, 188, it decided that a plate printer working under a contract at an agreed rate per one hundred sheets was a contractor. In *United States* v. *Germaine,* 99 U. S. 508, it held that a surgeon appointed to examine pensioners, receiving compensation on a fee basis, was not an officer of the United States. Contrasting the case with the *Hartwell case, supra,* it said (p. 512):

> In the case before us the duties are *not* continuing and permanent, and they *are* occasional and intermittent. * * *
>
> If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.

And in *Auffmordt* v. *Hedden,* 137 U. S. 310, it held that a "merchant appraiser" appointed by the Collector of Customs was not an officer of the United States, saying (pp. 326, 327):

> He is selected for the special case. He has no general functions, nor any employment which has any duration as to time, or which extends over any case further than

> as he is selected to act in that particular case. * * * His position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an "officer," within the meaning of the clause of the Constitution referred to.

The distinction between an employee and an independent contractor is too clear to require lengthy discussion. As pointed out in *Singer Mfg. Co.* v. *Rahn,* 132 U. S. 518, 523:

> The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, "not only what shall be done, but how it shall be done."

As said in 14 Ruling Case Law, 67:

> An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of his work.

See also *Chicago, R. I. & P. Ry. Co.* v. *Bond,* 240 U. S. 449, 456; Labatt, Master and Servant, 2d ed., sec. 64; Cooley on Torts, 3d ed., p. 1098; Words and Phrases, First Series, II, 1535, Second Series, I. 999, 1000.

The receipt of "fees" does not transform the partners into either officers or employees. When the statute says that the tax shall not apply to compensation or " fees " received by persons as officers or employees, it is obviously referring to the fees which representatives of the Government are allowed to charge members of the public in lieu of compensation provided by taxation, and not to the fees which consulting engineers may charge the Government. The law obviously refers to the fees charged by recognized officers and employees; it does not declare that men shall be considered officers or employees because they receive fees of another type.

The members of this firm were clearly independent contractors and not officers or employees of any State or subdivision thereof.

II

Congress has been expressly granted broad powers of taxation and it has been impliedly forbidden to tax instrumentalities of the States. While this limitation upon the taxing power should be given such effect as is necessary to carry out the purpose for which it exists, it should not be extended beyond its original scope

The principle that the States may not impose taxes which interfere with the exercise of powers granted to the Federal Government and that the Federal Government may not impose taxes which interfere with the exercise of the essential powers of the States is a principle which does not rest upon any express provision of the Constitution. It exists by necessary implication in order to preserve those governmental powers which were granted to the Federal Government from diminution by indirection through State taxation and to preserve the powers which were reserved to the States from any diminution by indirection through the exertion of the taxing powers of the Federal Government. While this restraint upon the taxing powers is not to be found anywhere within the Constitution set forth in formal phrases, it is a restraint which is necessarily implied from the express provisions of the supreme law of the land. No one can question the propriety of such a restraint or the propriety of recognizing it. Nor can any one properly deny that the restraint is just as broad as is really necessary to effectuate the purpose for which it exists.

In considering the scope of this limitation upon the taxing power the Court should remember that its duty is not to apply a formula but to give effect to a principle. Both the States and the Federal Government must be allowed to exercise all of the powers intrusted to them without interference either direct or indirect. On the one hand, it may be said that neither a State nor the United States may interfere indirectly by taxation with the activities of the other government. But, on the other hand, it must be recognized as equally true that both governments necessarily possess broad powers of taxation and such powers can not properly be limited by far-fetched rulings that the application of a normal tax by one government would constitute an illegitimate interference with the activities of another government. The taxing power, unless clearly misapplied, must be recognized as constituting as legitimate an exercise of governmental power as the exercise of any other power of government.

The Court, then, is confronted with the fact that our Constitution has not made a complete distribution of all governmental powers, Federal and State, into mutually exclusive compartments. If it treats each governmental power as having that logical completeness which might be attributed to it if it stood alone, the Court will find that there are overlapping jurisdictions. Such conflicts of power must be met in the spirit in which a court passes upon the right of an individual in a community which is becoming thickly populated to be free from disturbance by the acts of his neighbors. The Court must sometimes refuse to concede logical completeness to either conflicting governmental power but, instead, must place somewhere a practical dividing line between what would otherwise be overlapping jurisdictions.

In establishing this dividing line with reference to Federal taxation, the essential activities of the States must be protected. The protection, however, can not properly extend to every person who may in any way aid a State. The kindred rule that a State may not be sued for the torts of its subordinates is not applied to all State activities, for there is a recognized distinction between activities of a governmental nature and those of a proprietary nature. This distinction is not based upon any thought that activities of a "proprietary" character are all revenue producing, or upon the ground that they are all beyond the legitimate functions of a present-day State or municipality. The courts recognize that it is unfair to allow the immunity of the State from suit to be pressed to such an extreme as to render the State or city immune from liability for every tort of its subordinates; they recognize the necessity of placing a dividing line somewhere; and they find that the most natural and proper dividing line is between those activities of government which were, and those which were not, usual when the rule as to governmental immunity from liability for torts was established.

By analogy the rule as to immunity from taxation may be properly established along similar lines, not merely exempting from taxation those activities which are governmental and subjecting to taxation those activities which are proprietary in their nature, but recognizing those governmental methods which were customarily employed when the rule as to the immunity of State instrumentalities from Federal taxation was established as furnishing a sound guide in establishing the extent to which those who have relations with a State shall be immune from taxation. The recognized instrumentalities of a State or municipality as that term was understood at the time when the rule as to the immunity of such instrumentalities of the States from Federal taxation was first recognized may be properly considered exempt from taxation. But this rule would be carried to an impracticable extent if it were held that all persons who furnish supplies or technical advice to the Government were free from taxation based upon the compensation received by them. The implied restraint which the Constitution imposes upon Federal taxation of State instrumentalities should protect only the long-recognized agencies of the States.

III

Those who deal with a State, supplying materials or advice in accordance with contracts, are not in such intimate relations to the State as to be exempt from Federal taxation upon the ground that they are State instrumentalities

This Court said in *United States* v. *Germaine,* 99 U. S. 508, 512, that if Congress passed a law calling for the appointment of a man to furnish fuel that man would have as much claim to be considered an officer of the United States as the surgeons who were appointed under that statute would have. The expert who is brought in from the outside to furnish advice upon a specific problem which is placed before him is no more an instrumentality of the government than is the manufacturer who furnishes supplies or the carrier who furnishes transportation.

These experts were no part of the local governments. They were not the agencies through whom contacts were established with the outside world.

They were themselves part of that outside world with whom the real agents of the municipal and State governments dealt, making definite purchases just as clearly as if the contracts had called for the delivery of carloads of coal or the construction of schoolhouses. Surely it can not be said that all of the persons and corporations with whom our State and local governments enter into contracts are in the eyes of the law instrumentalities of government, and as such free from bearing their proportionate share of the burden of uniform taxation by the Federal Government. The principle underlying the rule of exemption is that neither sovereign should by taxation interfere with the carrying on of the normal functions of the other sovereignty. But such wholesale exemptions from taxation as are involved in the doctrine advocated by this firm would necessarily interfere materially with the functions of the government whose taxing powers were so drastically reduced. (*Union Pacific R. Co.* v. *Peniston,* 18 Wall. 5, 30, 31, quoted in *Western Union Tel. Co.* v. *Massachusetts,* 125 U. S. 530, 550.)

Let the Court consider a concrete case. Suppose that Congress should take over one of the great railroad systems between New York and Chicago and operate that system in competition with the other lines. If no tax could be laid upon its property, upon the bonds which it might choose to issue, upon its employees or upon the coal mines, rail mills, locomotive shops, and car plants which furnished it supplies and equipment, that railroad line could be operated profitably at rates which would drive every competing trunk line into bankruptcy, and the States through which it operated would be deprived of a large proportion of their necessary revenues. Surely immunity from taxation could not be carried to such extremes.

And even in the less extreme cases where governmental activities are not proprietary but political in character, it is submitted that the real purpose of the rule exempting State agencies from Federal taxation is given all the scope which is reasonably proper when it is held that only officers and employees are within the rule and that outside contractors furnishing supplies or advice are not such instrumentalities of the State that the portion of their net income which may be considered as derived from that source should be relieved from normal Federal taxation.

In *Montana Catholic Missions* v. *Missoula County,* 200 U. S. 118, where the plaintiff contended that because Congress had from time to time made appropriations to aid the plaintiff in its work among the Indians it had made the corporation a governmental agency and as such exempt from local taxation, the Court held that the claim did not have a foundation of plausibility and said (p. 129):

> The Government may lease a building from a private owner for the purpose of better carrying on its governmental duties,

> and yet the building is not such an instrumentality of government as prevents its taxation by or under State authority.

If a building leased to the United States may be taxed by a State, why may not the United States collect its usual income tax from men who are not agents of the State but merely furnish advice, under contracts, to the actual agents of the State?

It is true that under some circumstances even the making of leases may constitute essential operations of the Government, as in *Choctaw, O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, and in *Gillespie* v. *Oklahoma,* 257 U. S. 501. In those cases the financial character of the transaction was its dominating feature, from the viewpoint of the Government. But from those cases it would be a far cry to hold that every person who makes a sale to a government thereby becomes one of its instrumentalities.

In the present case the tax was not on the gross income from the municipalities but upon the net income derived from all sources. Each year the various activities of this business partnership covered a wide range of undertakings. Only after the entire income from all sources had been mingled together and the overhead expenses deducted and the proportion of net income allocatable to each undertaking had been computed could the partners determine what portion of the net income should be assigned to each of the items involved in this case. Only the net income was taxed and whether it had been derived from contracts with governmental bodies or from services rendered to private individuals it was all taxed in the same way. Such taxes, at most, touch their relations with the local governments only remotely. A Federal tax which falls on the transmission of State bonds is not a tax on those bonds, *Greiner* v. *Lewellyn,* 258 U. S. 384, and one which falls upon the incomes of exporters is not a tax upon exports, *Peck & Co.* v. *Lowe,* 247 U. S. 165. A State tax which falls on premiums on bonds of officials of the United States is not unconstitutional as interfering with instrumentalities of the United States, *Fidelity & Deposit Co.* v. *Pennsylvania,* 240 U. S. 319, 323; a State tax on land conveyed by the United States with a reservation to the Government of the right to retake the land upon noncompliance with a condition is valid, *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375; and a State tax upon the property of a railroad company within a Federal reservation must be sustained, *Fort Leavenworth R. Co.* v. *Lowe,* 114 U. S. 525. As the Court said in the *Baltimore Shipbuilding Co. case,* 195 U. S. at p. 382, cited with approval in the *Fidelity & Deposit Co. case, supra:*

> It seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person or its property, because it is employed by the

> United States, even if the work for which it is employed is important and takes much of its time.

But whether the tax here imposed relates remotely or proximately to the services which were rendered by the plaintiffs is not essential. The important fact to be borne in mind is that their relations to the municipal and State governments were not those of officers or employees. They were not representatives of those governments. They were men who rendered services as independent contractors.

IV

The exemption of State instrumentalities from Federal taxation relates only to State activities of a governmental nature and not to activities undertaken in a private capacity

In *South Carolina* v. *United States,* 199 U. S. 437, 463, it was held that license taxes charged by the Federal Government upon persons selling liquor was not invalidated by the fact that they were the agents of a State which had itself engaged in that business. After reviewing earlier cases the Court said (pp. 461, 463):

> These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the

> carrying on of 'an ordinary private business. * * *
>
> Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.

In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, in deciding that public service corporations were not exempt from Federal taxation, the Court pointed out that in *South Carolina* v. *United States* it had held that when a State, acting within its lawful authority, undertook to carry on the liquor business it did not withdraw the agencies of the State carrying on the traffic from the operation of the internal revenue laws of the United States, and it added (p. 172):

> If a State may not thus withdraw from the operation of a Federal taxing law a sub-

ject matter of such taxation, it is difficult to see how the incorporation of companies whose service, though of a public nature, is, nevertheless, with a view to private profit, can have the effect of denying the Federal right to reach such properties and activities for the purposes of revenue.

It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water, and the like. These objects are often accomplished through the medium of private corporations, and though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred.

The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the State in carrying out its purposes; the latter, although regulated by the State, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation.

The distinction between municipalities as agents of a State for governmental purposes and as organizations to care for local needs in a private or proprietary capacity is further referred to in the recent case of *Trenton* v. *New Jersey,* 262 U. S. 182, 191.

V

In many of these undertakings the services rendered by the partners to the State and local governments did not relate to governmental functions

(a)

The construction, supervision, and operation of a municipal sewage disposal or treatment plant is in aid of a proprietary function so far as invoking the immunity of a sovereign is concerned

While it is clear that a State or a subdivision thereof, when authorized by its charter, may assert the police power in dealing with the subject of sewage disposal, it is generally held that the construction, supervision, and maintenance of a sewerage system for a municipality is so far proprietary that there is full responsibility for damages caused by the torts of officers and agents of the municipality. ***Barnes* v. *District of Columbia,* 91 U. S. 540; *Weightman* v. *Washington,* 1 Black, 39; *Ostrander* v. *Lansing,* 111 Mich. 693; *Detroit* v. *Corey,* 9 Mich. 165; *Donahoe* v. *Kansas City,* 136 Mo. 657; *Sinton* v. *Ashbury,* 41 Cal. 525; *Winona* v. *Botzet,* 169 Fed. 321.**

The partners were assisting and advising in respect to the operation of sewage disposal systems of

a proprietary character in Marlboro, Mass., Schenectady, N. Y., Plainfield, N. J., and Framingham, Mass.

Marlboro, Massachusetts. (R. 9.) The service consisted of supervising the operation of the municipal sewage-treatment plant and rendering periodical reports thereon to the water and sewer board of the city. Inasmuch as the statement of fact clearly limits the services rendered to supervision of the operation of the sewage plant, it seems that it is immaterial to what arm of the government the report was submitted.

Schenectady, N. Y. (R. 10.) It appears that the services rendered related to a sewage-treatment plant already established and in operation and consisted of an examination of the plant and conferences with the man in charge as to operating conditions and the giving of advice as to what changes and improvements should be made.

Plainfield, N. J. (R. 11.) The statement, though brief and inadequate, discloses that the services related to a sewage-treatment plant already in operation. While the motivating cause of the investigation was the danger of the plant becoming a nuisance, still the services related to the operation of the plant. The problem to be met was obviously one of more efficient management and operation.

Framingham, Massachusetts. (R. 11.) It appears that the services consisted of reviewing for the city previously prepared plans of sewers and a sewage-treatment plant. It does not appear whether the plans preceded the exercise of any governmental act legislative in character or whether they were the engineering plans prepared after legislative action and incident to the carrying out of decisions already reached. While it is true that there is some confusion among the authorities concerning sovereign immunity from liability arising from the adoption of plans, it is clear that if a legislative plan has been adopted and the plans are incident to the construction of the sewers and the sewage-treatment plant, no such immunity exists. It is apparent that as to this item the partners have not affirmatively shown any service in aid of the governmental function.

(b)

Services rendered in respect to construction, operation, or maintenance of waterworks supplying water for domestic use and fire protection are in the furtherance of a proprietary purpose

The law seems to be established, with slight disagreement among the authorities, that when a State or municipality enters into the business of supplying water to its inhabitants it is engaged in a proprietary, not a governmental enterprise. *Bailey* v. *New York*, 3 Hill (N. Y.) 531; *Rhobidas* v. *Concord*, 70 N. H. 90; *Esberg Cigar Co.* v. *Portland*, 34 Ore. 282; *Armstrong* v. *Philadelphia*, 249 Pa. 39; *Aldrich* v. *Tripp*, 11 R. I. 141.

This remains true even though as an incident of such water system provision be made for supplying water as a protection against fires and connecting the system with fire hydrants for that purpose. The view seems to be that the principal use being private and domestic, the general status of the undertaking is not changed because as an incident thereof water is also supplied as a protection against fire. *Aldrich* v. *Tripp,* 11 R. I. 141, 146; *Piper* v. *Madison,* 140 Wis. 311; *Chicago* v. *Selz,* 202 Ill. 545.

The partners were assisting and giving advice concerning the construction, operation, and maintenance of municipal water works in Dayton, Ohio, Canton, N. Y., Sherburne, N. Y., and Billerica, Massachusetts.

Dayton, Ohio. (R. 11.) The services were in connection with designing a reservoir and supervising its construction by a third party acting under contract. While it appears from the preceding item in the Record that the reason for changing the water system from direct reliance upon artesian wells to a system with a reserve kept in a reservoir was to give greater protection against fires, still it appears by clear inference that the system as a whole was one of municipal supply for domestic use with incidental protection against fires. Except for the domestic use of water from the same wells, the source would doubtless have been wholly adequate for fire protection. It is apparent, therefore, that the reservoir was to be constructed in order to make adequate provision for the two uses of water.

Canton, N. Y. (R. 11.) There is no statement regarding the purposes for which the waterworks were required, but it certainly may be inferred that it was an ordinary municipal water-supply plant established for general domestic purposes.

Sherburne, N. Y. (R. 11.) There is the same situation as in Canton, N. Y., except that it is also said that "both preservation of the public health and protection against fire were involved." As this condition exists with respect to all municipal waterworks, it is difficult to see wherein that allegation of fact either adds to or detracts from the strength of this claim.

Billerica, Mass. (R. 11.) The service consisted of an examination of the stand-pipe which furnished storage of water for domestic and fire purposes. It obviously related to problems concerning the operation or maintenance of waterworks already established and in operation.

(c)

Other Items

The defendant has not endeavored to classify the remaining items because in some instances it is believed that prima facie the services related to undertakings which were governmental in character as distinguished from those which the courts have characterized as proprietary, and in other instances the statement of facts is not sufficient to permit classification.

For example, it appears that the services of Mr. Eddy were employed by the City of Buffalo in relation to the pollution of the Niagara River. (R. 11.) It does not appear whether this pollution problem arose as an operating problem of the sewage-disposal system of that city or whether actuated by a desire to safeguard fish from pollution coming from industrial plants, such as dye houses, or whether the source of the pollution was some other municipality located on the banks of the river. In other words, there is no sufficient statement of facts to show whether the services were in aid of a governmental or a proprietary function.

Again, it appears that in New Haven, Conn. (R. 10), the services consisted of the examination of plans for a dam across *a* river with tide gates to prevent salt water from backing up. The mere fact that the report on this work was made to the Park Commission does not warrant the conclusion that the services related to the protection of land actually devoted to a public park. It is a fact of common knowledge that park commissions in many cities have charge of all lands and real estate owned by the city, and it is important to know whether that land is held in proprietary ownership or actually devoted to the park uses, for in the case of such land it is not the ownership but the use to which it is put that determines whether or not a governmental or a merely proprietary problem is involved.

Much the same situation also exists in respect to the services rendered in Lynn, Mass. (R. 12.)

They dealt with the problem of disposing of surface waters occasioned by severe storms. There is nothing to indicate the ownership of the properties which would receive the resulting protection.

The burden is upon the claimants to present from the record the statement of a complete case justifying recovery in respect to each item. It is not open to the claimants to rely upon possible inferences.

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Solicitor General.
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NOVEMBER, 1925.

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Supreme Court of the United States

OCTOBER, 1925, TERM.

No. 183

LEONARD METCALF and HARRISON P. EDDY, copartners, under the name and style of METCALF & EDDY,

Plaintiffs-in-Error,

against

JOHN J. MITCHELL, former Collector of Internal Revenue for the District of Massachusetts.

No. 376.

JOHN J. MITCHELL, former Collector of Internal Revenue for the District of Massachusetts,

Plaintiff-in-Error,

against

LEONARD METCALF and HARRISON P. EDDY, copartners, under the name and style of METCALF & EDDY.

POINTS OF *AMICUS CURIAE* ON BEHALF OF EMMA B. BRUNNER, AS EXECUTRIX OF THE ESTATE OF ARNOLD W. BRUNNER, LATE OF THE CITY OF NEW YORK, DECEASED.

LEWIS M. ISAACS,
52 William Street,
New York City,
Amicus Curiae.

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Supreme Court of the United States

October 1925 Term.

LEONARD METCALF and HARRISON P. EDDY, copartners, under the name and style of METCALF & EDDY,
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POINTS OF *AMICUS CURIAE* ON BEHALF OF EMMA B. BRUNNER, AS EXECUTRIX OF THE ESTATE OF ARNOLD W. BRUNNER, LATE OF THE CITY OF NEW YORK, DECEASED.

By permission of the Court, this argument is submitted, the large importance of the questions involved to the intervenor and to numerous other taxpayers similarly situated being regarded as a justification.

Counsel will not, in the discussion which follows, attempt to deal with the specified character of the work performed by the plaintiffs-in-error, the compensation for which has been held taxable income, but will confine the argument to those legal aspects of the case of general applicability, in the effort to aid in the establishment of a principle which shall govern all cases involving this aspect of the Income Tax Laws.

POINTS.

I.

Under well-settled and unquestioned authority, the Federal taxing power is constitutionally limited by the implied prohibition against taxing the means, agencies and instrumentalities of the States and their political subdivisions.

This doctrine was firmly established in *Collector* vs. *Day*, 11 Wall., 113, where the Supreme Court held that the Federal Government could not levy an income tax on the salary of a State Judge. Approving and following the decisions in *Dobbins* vs. *Commissioners of Erie County*, 16 Pet., 435, where, conversely, it was held that the State could not levy a tax upon the salary or emoluments of a Federal officer and in *McCulloch* vs. *Maryland*, 4 Wheat., 316, holding that the state could not tax notes of the Bank of United States, the opinion reads, in part, as follows (page 127):

> "* * * In respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means

> and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily and for the sake of self-preservation exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. *In both cases the exemption rests upon necessary implication and is upheld by the great law of self-preservation; as any government whose means employed in conducting its operations, if subject to the control of another and distinct government can exist only at the mercy of that government.*"

In *United States* vs. *Railroad Company*, 17 Wall., 322, after referring to the exemption of agencies and instrumentalities of States from the taxing power of the Federal Government and stating the reciprocal position of that Government and the States, the Court said (p. 327):

> "Their operations may be impeded and destroyed if *any interference* is permitted. Hence, *the beginning of such taxation is not allowed on the one side, is not claimed on the other.*"

In *Pollock* vs. *Farmers' Loan & Trust Co.*, 157 U. S., 429 (involving the constitutionality of the 1894 Income Tax Law), the Court, though divided on other aspects of the case, was unanimous as to the want of power in the Federal Government to tax the means and agencies of State Governments, and, as a corollary therefrom, the want of power to tax income from their securities, saying in part (pages 585-6):

> "We think *the same want of power to tax the property or revenue of the States, or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason,* and that reason is given by Chief Justice Marshall in *Weston* vs. *Charleston*, 2 Pet., 449, 468, where he said 'The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence, depends on the will of a distinct government. *To any extent, however inconsiderable, it is a burden on the operation of government.* It may be carried to an extent which shall arrest them entirely * * *. The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.' Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax upon the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution."

As expressed in the dissenting opinion of the late Chief Justice White (p. 652):

> "In regard to the right to include in an income tax the interest upon the bonds of municipal corporations, I think the decisicn of this Court, holding that the Federal Govern-

> ment is without power to tax the agencies of the State Government, embrace such bonds, and that the settled line of authority is conclusive on my judgment here. It determines the question that *where there is no power to tax for any purpose whatever, no direct or indirect tax can be imposed.*"

In *Flint* vs. *Stone-Tracy Company*, 220 U. S. 108 (involving the constitutionality of the Corporation Tax Law of 1909), the Court said on this point (page 157):

> "The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the governmental operations of the States."

The fundamental character of this doctrine is recognized in numerous other cases.

II.

Immunity from tax of governmental agencies and instrumentalities extends only to persons engaged in the performance of strictly governmental functions.

The cases clearly and consistently indicate that the immunity from tax which has been discussed in the preceding point extends only to those governmental operations which are "essentially" or "strictly" governmental. The dividing line as well illustrated in the case of *South Carolina* vs. *United States*, 199 U. S. 437, where the Federal power to tax operations involving the sale of liquor through State dispensaries was upheld. The Court noted, after a review of the earlier cases (page 461), that the decisions

> "indicate that the thought has been that *the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character* and does not extend to those which are used by the State in the carrying on of an ordinary private business."

The opinion then refers to the authorities treating of tort liability of municipalities, and notes (page 463) that

> "there is a clear distinction as respects responsibilities for negligence, between the powers granted to a corporation for governmental purposes and those in aid of private business,"

and that

> "a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent a full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation."

In *Flint* vs. *Stone-Tracy Co.,* 220 U. S. 108, 172, the Court recognized the distinction in the following language:

> "The true distinction is between the attempted taxation of *those operations of the*

> *state essential to the execution of its governmental functions, and which the state can only do itself,* and those activities which are of a private character. The former, the United States cannot interfere with by taxing agencies of the state in carrying out its purposes."

The discussion in negligence cases helps to clarify the problem. One test of activities not strictly governmental in these cases is whether pecuniary profit in the operations is an objective. In the exercise of strictly governmental functions that feature is lacking or at any rate subordinate.

In *Maximilian* vs. *Mayer*, 62 N. Y., 160, the leading New York case on the subject, it was held that the municipal corporation required by legislative enactment to appoint commissioners of public charities and corrections, incurs no liability for the negligence of an employee of the commissioners in driving an ambulance belonging to the city which struck and caused the death of plaintiff's intestate. The decision was based upon the theory that the commissioners were engaged in the discharge of public governmental functions, and hence the city was not liable. The opinion reads in part as follows (page 167):

> "It is seen at once that the powers and duties of the commissioners of charities and corrections are not to be exercised and performed for the especial benefit of the defendant. *It gets no emolument therefrom, nor any good as a corporation.* It is the public, or individuals as members of the community, who are interested in the due exercise of these powers and the proper performance of their duties."

Some stress was laid in this case upon the fact that the officers while appointed by the corporation, were not under its immediate control; but this was not a determining factor, and in later cases has been ignored. Thus, in *Wilcox* v. *City of Rochester,* 190 N. Y. 137, the Court of Appeals refers to the case as follows:

> "The broad general doctrine of the *Maximilian* case, which is certainly not now open to question in the courts of this state is that 'two kinds of duties are imposed on municipal corporations, the one governmental and a branch of the general administration of the state, the other *quasi* private or corporate'; and 'that in the exercise of the latter duties the municipality is liable for the acts of its officers and agents, while in the former it is not.'"

In the *Wilcox* case, the municipality was held not liable for injuries sustained by a mechanic on his way to repair the roof of a building maintained by the City for police headquarters.

In *Eddy* v. *Village of Ellicottville*, 35 App. Div. 256, the maintenance of a jail was held to be a governmental function, so that negligence in the operation of it did not impose liability on the municipality, the Court saying:

> "Now, the basis of an implied municipal liability for negligence is either an obligation which rests upon the municipality in respect of its special or local interests, or else it is one under which it voluntarily assumes an undertaking from which it derives some benefit or advantage, or for which it expects to receive a consideration."

In *Hughes* v. *County of Monroe*, 147 N. Y. 49, the same rule was applied in an action by an employee of an insane asylum maintained by the

County, to recover for personal injuries while operating a mangle in the laundry. It was sought to take the case out of the general rule by a showing that the asylum received moneys from some committees of lunatics and relatives and also a small sum annually from the sale of farm produce and was therefore "engaged in a private enterprise resulting in profit." But the Court said:

> "The revenue derived from both of the sources referred to is merely incidental and tends to some little extent to lessen the public burden assumed by the County of Monroe."

In *Snider* v. *St. Paul*, 15 Minn. 466, it was held that the duty of providing and maintaing a City Hall for the use of city officers was a public and governmental use, and that the City was not liable for the negligence of its agents or servants in the discharge of that duty. The opinion reads in part as follows:

> "It is also generally held that they are not liable for negligence in the performance of a public, governmental duty imposed upon them for public benefit and from which the municipality in its corporate or proprietary capacity derives no pecuniary benefit."

From the above cases and many others to which reference might be made, it is clear that the obvious functions of administration of justice, securing public safety, maintenance of governmental buildings, etc., are strictly governmental. Just as clearly at the opposite extreme are municipal operation of gas and electric light systems. In between, are the border line cases depending for their solution, at least to an extent, on the individual Judge's political theory of the appropriate functions of government. An interesting field of discussion is presented by the consideration of the ultimate result of the opposing tendencies of limiting immunity from tax and extending the sphere of governmental operations. Whatever the application to the particular case of the general principle, and conceding that "there is no established rule for the determination of what belongs to the one or the other class" (*City of Trenton* v. *State of New Jersey*, 262 U. S. 182, 191), the underlying distinction is settled now beyond the further possibility of controversy.

III.

The Sixteenth Amendment to the Constitution did not extend the Federal taxing power to new subjects and hence has not affected the scope of the decisions referred to, *supra*.

In *Brushaber* v. *Union Pac. R. R. Co.*, 240 U. S. 1 (involving the constitutionality of the Revenue Act of 1913), the Court made an exhaustive inquiry into the effect of the Sixteenth Amendment on the Federal taxing power, pointing out (p. 18) that it was

> "drawn for the purpose of doing away for the future with the principle upon which the *Pollock* case was decided, that is, of determining whether a tax on income was direct, not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amend-

> ment provides that income taxes from whatever source the income may be derived shall not be subject to the regulation of apportionment."

In *Peck* vs. *Lowe*, 247 U. S. 165, it was said (page 172):

> "As pointed out in recent decisions, it (the Sixteenth Amendment) does not extend the taxing power to new or excepted subjects, but merely removes all occasion, which otherwise might exist, for an opportionment among the States of taxes laid on income, whether it be derived from one source or another."

In *Eisner* vs. *Macomber*, 252 U. S. 189, the Court said: "*As repeatedly held,* this (Amendment) did not extend the taxing power to new subjects"; and in *Evans* vs. *Gore*, 253 U. S. 245, the same point is reiterated "after further consideration", leaving no room for doubt on the subject.

IV.

A tax upon the income from a source itself immune from tax is as objectionable, constitutionally, as a tax upon the source of the income.

In the opinion in the *Brushaber* case, commenting on the effect of the decision in the *Pollock* case, the Court was at pains to show that the earlier decision did not question the fact that "in common understanding" the tax "was direct merely on income and only indirect on property." Nevertheless, it was conceded that the *Pollock* case did hold that:

> "Considering the substance of things, it was direct on property in a constitutional sense, since *to burden an income by a tax was from the point of substance to burden the property from which the income was derived,* and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent."

On the rehearing in the *Pollock* case (158 U. S. 601), this Court said (p. 630):

> "If the revenue derived from municipal bonds cannot be taxed because the source cannot be, *the same rule applies to revenue from any other source not subject to tax.*"

The reasoning in the *Pollock* case was applied in *Gillespie* vs. *Oklahoma*, 257 U. S. 501, where the income tax law of the State of Oklahoma was attempted to be enforced as to the net income derived by a lessee of Indian lands from sales of his share of oil and gas mined. It had already been held in prior cases involving leases of Indian lands that the lands themselves could not be taxed (*Choate* vs. *Trapp*, 224 U. S. 665); that the lessee could not be taxed on the gross sales of mined coal on the theory of an occupation or privilege tax (*Choctaw* vs. *Harrison*, 235 U. S. 292), and that neither the lease nor the stock of the company owning it could be taxed (*Indian Territory Illuminating Co.* vs. *United States*, 240 U. S. 522)—all on the broad ground that taxes on Indian lands or on the leases of such lands were invalid as attempts to tax an instrumentality through which the United States was performing its duty to the Indians. Then came the proposal to subject the lessee of such lands to an income tax on the profits derived by him from his operations under the lease. The opinion, per Holmes, J., reads in part as follows:

> "The same consideration that invalidates a tax upon the leases invalidates a tax upon the profits of the leases, and, stopping short of theoretical possibilities, *a tax upon such profits is a direct hamper upon the efforts of the United States* to make the best terms that it can for its wards. *Weston* vs. *Charleston*, 2 Pet. 449, 468."

(The *Gillespie* case will be discussed more at length in the succeeding Point. Here it is referred to as convincing support for the contention set forth in the caption of this point.)

In *Oklahoma Ry. and Land Co.* vs. *Pratt*, 14 Hawaii, 126 (cited by Holmes, J., in the *Gillespie* case), the Supreme Court of the Territory held that income from property, itself exempt from tax, could not be taxed, saying:

> "*A tax on income is in substance and effect a tax on the property producing the income.* Income derived from property exempt from taxation by contract, authorized by statute, is also exempt."

In *United States* vs. *King County, Washington*, 281 Fed. Rep. 686 (Circuit Court of Appeals, 1922), it was held that the County operating a ferry was not required to collect and pay over to the Government the transportation tax imposed under the Revenue Acts of 1917 and 1918; since the maintenance and operation of the ferry was an exercise of a strictly governmental function protected from taxation by the Federal Constitution. The argument was made that the tax was not imposed upon the County, but upon the persons paying to it the transportation charges; but the Court held that this did not meet the objection, saying:

> "It is obvious that the collection of those charges is at least one of the means which the County must resort to for the purpose of paying the costs of the ferry, which, if insufficient, must be made good from its other revenues or by general taxation. Hence it seems plain that the Federal tax here involved is an interference with and a burden upon the governmental functions of the State."

V.

Under the authority of *Gillespie* vs. *Oklahoma*, 257 U. S., 501, the profits derived from services or contracts performed by an agent or instrumentality of Government are not taxable income under the Revenue Act of 1913 or later enactments.

The *Gillespie* case, referred to in the preceding point, involved the power of a State to impose an income tax on profits derived by a lessee of Indian lands from his lease made with the Federal Government; and on the theory that he was an instrumentality of government, the Supreme Court held, in an opinion written by Mr. Justice Holmes, that such profits were beyond the reach of the State income tax law. As already shown (Point I, *supra*) the immunity from Federal tax of State agencies and instrumentalities is as absolute as that of Federal agencies and instrumentalities from State tax. The direct bearing of this case, therefore, on the case here under consideration is obvious, from the following extract from the opinion:

> "The criterion of interference by the States with interstate commerce is one of *degree.* It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the States are to exist and make laws (cit. cases). *The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance. Williams* vs. *Talledega,* 226 U. S. 404, 416, 417, 419. *Johnson* vs. *Maryland,* 254 U. S. 51, 54. 'A tax upon the leases is a tax upon the power to make them and could be used to destroy the power to make them.' 240 U. S. 530. *The step from this to the invalidity of the tax upon income from the leases is not long.*
>
> *In cases where principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived* and if a part of it comes from such a source the tax is *pro tanto* void; *Pollock* vs. *Farmers' Loan & Trust Co.,* 157 U. S. 429; 158 U. S. 601; a rule lately illustrated by *Evans* vs. *Gore,* 253 U. S. 245; and applied in a case somewhat like the present by the Supreme Court of Hawaii; *Oklahoma Ry. & Land Co.* vs. *Pratt,* 14 Hawaii. 126."

In *Williams* vs. *Talladega,* 226 U. S. 404, referred to in Mr. Justice Holmes' opinion, a State ordinance taxing without exemption the privilege of carrying on the telegraph business, a part of which was a governmental agency—the transmission of governmental messages under an Act of Congress—was held void as an unconstitutional attempt to tax a Federal agency. In *Johnson* vs. *Maryland* (also cited by Mr. Justice Holmes) a State law penalized those who operated trucks on highways without obtaining a license, based upon an examination as to competency and payment of a fee; and it was held not constitutionally applicable to a post office employee while engaged in driving a governmental motor truck in the performance of his duty.

The result reached in *United States* v. *Kings County, Washington* (referred to in the preceding Point), is a further illustration of the extent to which possible interference with governmental functions is safeguarded by the Courts. Even though the transportation tax was collectible from passengers, it was held an interference with and a burden upon the exercise of the governmental function of operating the ferry.

VI.

Plainly distinguishable in fact and in principle from the *Gillespie* case are those cases dealing with the express constitutional limitations on the Federal taxing power.

In *Peck* vs. *Lowe*, 247 U. S. 165, it was held that the Income Tax Law applied to profits of an exporting business, in spite of the constitutional prohibition against a tax or duty "on articles exported from any State"; because the tax was not on the exportation of the article, but on the net result of the venture, without discrimination against exportable articles as distinguished from other articles. The Court quotes from *Cornell* vs. *Coyne*, 192 U. S. 418, to the effect that:

> "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles and does not mean that articles exported are relieved from the prior ordinary burdens

> of taxation which rests upon all property similarly situated. The exemption attaches to the export and not to the article before its export."

And the opinion continues (p. 174):

> "While fully assenting and adhering to the interpretation which has been put on that clause in giving effect to its spirit as well as its letter, we are of opinion that to broaden that interpretation would be to depart from both the spirit and the letter."

Again, in *United States Glue Co.* vs. *Oak Creek*, 247 U. S. 321, where the Wisconsin Income Tax Law was attacked as not applicable to profits from transactions in interstate commerce, because so to apply it would contravene the commerce clause of the Constitution, it was held that the effect was not "so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the States." The opinion contrasts *Peck* vs. *Lowe* with *Crew Levick Co.* vs. *Pennsylvania*, 245 U. S. 292, as indicating and illustrating the correct line of distinction. In the latter case, a State tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions was held unconstitutional, because by its necessary effect a tax upon the commerce and, at the same time, a duty upon exports;

> "since it operated to lay a direct burden upon every transaction by withholding for the use of the State a part of every dollar received."

On the other hand (p. 329):

> "A tax upon the net profits has not the same deterrent effect, since it does not arise at all

> unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large * * *. And if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

In *Evans* vs. *Gore*, 253 U. S. 245, and *Miles* vs. *Graham*, 69 Adv. Ops. 686, the question involved was whether the Revenue Act of 1918, which, in terms, attempted to tax the salaries of Federal Judges, was in violation of the constitutional prohibition against diminishing the income of a judical officer during the term of his office. It was held that the effect of the imposition of the tax was to diminish the income of the taxpayer, and hence to come within the constitutional inhibition. The fact, in the later case, that the Judge was appointed after the passage of the Act, was held to be immaterial. The opinion, in the former case reads in part as follows (page 254):

> "Obviously diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. * * * Only by subordinating substance to mere form could it be held that his compensation was not diminished."

In the *Miles* case, it was said that

> "to require all Judges to return their compensation as an item of 'gross income' and to tax this as other salaries" is forbidden by Constitution;

because

> "to exact a tax in respect of this (compensation) would diminish it within the plain rule of *Evans* vs. *Gore*."

There was a vigorous dissent in the *Gore* case by Mr. Justice Holmes (concurred in by Mr. Justice Brandeis), on the ground (among others) that no distinction really existed between the constitutional prohibition there involved and those involved in *Peck* vs. *Lowe* and *Glue Co.* vs. *Oak Creek;* in other words, that the distinction between a direct burden and the indirect and remote burden should be applied to this express constitutional limitation on the taxing power, as it had to those referred to in the other cases. The significance of this dissenting opinion is very great, when it is recalled that Mr. Justice Holmes wrote the opinion in the *Gillespie* case, holding that the immunity from tax in the case of State and Federal agencies and instrumentalities of government, which does not depend upon any express provision of the Constitution, but on the prohibition implied from the independence of the States and Federal Governments within their own spheres (*Collector* vs. *Day*, 11 Wall., 113), was an absolute immunity—in other words that the *ratio decidendi* is not the same.

From the above discussion, we earnestly submit that a clear distinction appears between cases in which the express constitutional limitations on the

Federal taxing power are involved and those in which the immunity rests upon the prohibition, implicit in our dual form of government and "upheld by the great law of self-preservation," (*Collector* v. *Day*) against taxation of governmental means and instrumentalities—a prohibition applied impartially both to the Federal and the State Governments. In cases where the Federal taxing power is limited in express terms, those terms have been construed with a recognition of the fact (as stated by Mr. Justice Holmes in the *Gillespie* case) that "a certain amount of reaction upon the interference with" State authority necessarily results from governmental activities and the criterion of interference is one of degree. But in those cases where the prohibition is a necessary and fundamental implication from the law of self-preservation, it is not susceptible of construction, but is absolute; and the remoteness or size of the burden is not the criterion. An inquiry into the sources of the income is requisite and to the extent that the income is derived from an immune source the tax is *pro tanto* void. The reason, is that so clearly set forth in the opinion of Judge Marshall in *Weston* vs. *Charleston*, 2 Pet., 449, 468:

> "The right to tax the contract *to any extent* when made *must* operate upon the power to borrow before it is exercised and *have a sensible influence on the contract*. The extent of this influence depends upon the will of a distinct government. *To any extent, however inconsiderable, it is a burden on the operations of Government.*"

(According to the majority opinion in *Evans* vs. *Gore*, the constitutional mandate against "diminution" of judicial salaries made their immunity from taxation as absolute as that of governmental instrumentalities—an exception to the general rule opposed by the dissenting Judges.)

It has been suggested that the *Gillespie* case cannot be accepted as a precedent in cases involving other taxpayers exercising governmental functions, for the reason that it is based upon an historical background of long existing relations between the United States and its Indian wards and is therefore *sui generis.* But the opinion in that case is significantly silent on this aspect of the situation and discusses only general principles. Indeed, it is expressly stated (p. 505):

> "The decision in 240 U. S. 522 [*Indian Territory Illuminating Co.* vs. *United States*] that such leases were not taxable went on general principles, not on the nature of the particular statute."

VII.

The provisions of the Revenue Act of 1917 and the regulations promulgated under the later acts cannot limit the area of immunity from taxation of governmental means and instrumentalities.

This follows naturally and necessarily from what has proceeded, and calls for no further discussion. The earlier Revenue Acts all expressly exempted from income tax, "in the case of officers and employees under the United States or any State, territory or the District of Columbia, or any local subdivision thereof, the compensation or fees received by them as such officers or employees." The opinion of the Attorney General as to the propriety of continuing to apply this rule of non-taxability in the face of the omission so to provide in the Revenue Act of 1918 is put squarely upon the "well-settled rule that governmental agencies of the State are not subject to taxation by the Federal Government just as the government agencies of the Federal Government are not subject to taxation by the States" (31 Op. Atty. Gen. 441).

It remains only to point out that this "well-settled rule" is not applied to officers and employees of a State as such, but to agencies and instrumentalities of government, which is something different. In *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460, a State tax levied on all telegraph messages transmitted in Texas was held void as to government messages sent under a contract arrangement with the Company, because

> "it is a tax by the State on the *means* employed by the government of the United States to execute its constitutional powers."

Certainly, the Telegraph Company was neither an officer nor employee in the purview of the Regulations, but an independent contractor. Similarly in *William* v. *Talledega*, 226 U. S. 440, the Telegraph Company was held exempt from taxation on its receipts from governmental messages, not because it was an officer or employee, but because it was an instrumentality of government. Finally, in *Gillespie* v. *Oklahoma*, 257 U. S. 501, the lessee of Indian lands, whose net profits from operations were declared non-taxable, was by no stretch of language or imagination an officer or employee of government, but was exempted simply because he was an instrumentality of government.

On the other hand, not every employee whose salary comes from the State Treasury is exempt from tax. Thus, in *City of Seattle* v. *Poe*, 4 Fed. (2nd), 276, it was held that compensation of employees of a municipally owned and operated street railway was not tax exempt, because the operation of a street railway was not a strictly governmental function. Yet, the employee was directly responsible to the City for employment, and received his pay out of public funds and otherwise fulfilled all of the requirements of the Regulations. (The opposite result was reached in *Frey* v. *Woodworth*, 2 Fed. (2nd) 725, but on the ground that the City was exercising a governmental function in operating a street railway.)

When the underlying principle of immunity from tax, of State and Federal governmental agencies and instrumentalities is applied, the artificial rules and hopeless confusion evidenced by the Treasury Department decisions will disappear. The real inquiry is as to the nature of the employment, not its regularity, continuity, exclusive character or the immediate source of payment.

As early as the *Osborn* case (9 Wheat. 739), in which the Supreme Court was asked to reconsider its decision in *McCulloch* v. *Maryland*, it was argued that the Bank of the United States was a private corporation engaged in its own business and hence could not be considered a governmental agency. The Court held not so, although

> "it is undoubtedly capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, *it is also trading with individuals for its own advantage* * * * (p. 860).

> Considering the capacity of carrying on the trade of banking, as an important feature in the character of this corporation, which was necessary, to make it a fit instrument for the objects for which it was created, the Court adheres to its decision in the case of *M'Culloch against the State of Maryland*" (p. 867).

Recently the same ruling was made with respect to Federal Land Bank bonds. In *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, the question involved the constitutionality of an Act of Congress exempting the bonds of Federal and Joint Stock Land Banks from State taxation. The enactment was held valid, on the authority of *McCulloch* v. *Maryland* and *Osborn* v. *Bank*, although the majority of the capital stock was privately owned and held and the principal business of the banks was private banking conducted with the usual methods of such business.

So, too, in *Federal Land Bank of New Orleans* v. *Crosland*, 261 U. S. 372, it was held for the same reason, that the State could not require the payment by a Federal Land Bank of a mortgage tax, as a precondition of recording the mortgage.

In the case at bar the District Court of Massachusetts held that the Federal Income Tax Law of 1918 applied to the income of a private person although employed in governmental work, on the bare ground that

> "The taxing of the income of *private* persons, although arising from services rendered to a state, does not so *seriously interfere* with the governmental functions of the State as to be unconstitutional."

The *Gillespie* case is not referred to in the opinion. But the above statement is directly opposed to the decision in that case, where the Court said that the source of the income being immune from tax the question of the *extent* of the burden was immaterial and applied the doctrine to a *private person.*

That the effect of the income tax—if permitted to attach—would be to diminish the profits or emoluments of the agent acting as an instrumentality of government under a contract with such government is as true as it was in the case of the Judge's salary involved in *Evans* v. *Gore.* It would just as certainly "have a sensible influence on the contract" and thus become "a burden on the operation of government" (*Weston* v. *Charleston,* 2 Pet. 449), as in the case of the lessee of Indian land whose contract with the Federal Government was under consideration in the *Gillespie* case.

VIII.

Under the foregoing well-settled authorities, the emoluments or other compensation of a person or corporation derived from service rendered to a state or political subdivision thereof, in the essential exercise of its governmental functions cannot be reached as profits or income under the Revenue Act of 1913 or the later acts.

Washington, D. C., November, 1925.

Respectfully submitted,

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